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No. 264.

# In the Supreme Court of the United States.

BENJ. F. BUZARD AND MOSES HILLARD, APPELLANTS,

*vs.*

ROBERT A. HOUSTON, APPELLEE.

## BRIEF FOR APPELLANTS.

H. E. BARNARD,
OF COUNSEL FOR APPELLANTS.

PRESS OF SAN ANTONIO PRINTING CO.

No. 264.

# In the Supreme Court of the United States.

BENJ. F. BUZARD AND MOSES HILLARD, APPELLANTS,

*versus*

ROBERT A. HOUSTON, APPELLEE.

## BRIEF FOR APPELLANTS.

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Texas, and the branch thereof sitting at San Antonio.

It was a Bill in Equity, filed on November 23, 1881, by the appellants against Robert A. Houston, of Gonzales county, Texas.

The bill charges that defendant and Buzard for himself and other complainant, Hillard, on October 14, 1881, entered into an agreement, of which the following is a copy:

"SAN ANTONIO, TEXAS, October 14, 1881.

"Received this day of B. F. Buzard five hundred dollars, in part payment for fifteen hundred head of cattle, cows and bulls, to be contracted for next Tuesday, on which Mr. Buzard agrees to advance 50% of the price, which is to be fifteen dollars and fifty cents per head.

"R. A. Houston agrees to make the contract at the time specified, cattle to be delivered at Lampasas, Texas, between the first and the tenth of May, 1882.

"If the cattle are not delivered, R. A. Houston agrees to forfeit to B. F. Buzard fifteen hundred dollars if the contract is not filled. B. F. Buzard binds himself to take two thousand cows at the same figures, and to forfeit fifteen hundred dollars if he fails to comply with the contract.

"R. A. HOUSTON.
"B. F. BUZARD.

"WITNESS:
"D. W. HINKLE.
"J. H. PRESNALL."

That Buzard paid the five hundred dollars to Houston that evening.

That Buzard and Hillard were co-partners, and having purchased a large tract of land in Zavalla county, Texas, on the Nueces river, were at that time engaged in fencing and improving same for the purpose of carrying on the business of cattle raising.

That defendant knew this, and knew that these cattle contracted for had been purchased by Buzard for the benefit of said partnership, and were to be by them placed upon their said ranch, and that this class of cattle were, therefore, of peculiar value to this partnership.

That Buzard appeared in fulfillment of his appointment to meet defendant, on the next Tuesday, October 18, 1881, at San Antonio, but that defendant failed to appear there at that date. He sent Mr. Walker in his stead to report his inability to come, on account of sickness, to Buzard, and to arrange another day for their meeting, to enter into a more formal contract than that embodied in the aforesaid memorandum. Buzard and Mr. Walker being unable to fix a definite date for the meeting, owing to the uncertainty of Buzard's business engagements, it was between them agreed that Buzard

would be in San Antonio about the 10th or 12th of November, and would then telegraph defendant of his arrival, and defendant would come immediately to San Antonio, and have the formal contract drawn and executed with Buzard.

That when Buzard kept his appointment on October 18, 1881, he was ready, willing and anxious to execute and conclude the formal contract, and was prepared to make the advance payment of 50% of the contract price of said cattle.

That on October 31, 1881, Buzard and defendant were both in San Antonio, both arriving late in the evening, and casually met at the hotel, neither expecting to meet the other.

That by agreement between Buzard and defendant, the negotiations were renewed. That they agreed that in as much as both were there they would close their trade and execute the formal contract, instead of waiting until the time arranged between Buzard and defendant's messenger, Mr. Walker.

At this meeting, in the evening of October 31, 1881, defendant proposed to Buzard that in lieu of said contract with him for the cows and bulls mentioned in said memorandum contract, then in the hands of said D. W. Hinkle, the said Buzard should take from defendant an assignment of a contract which defendant had made with L. A. Mosty, of Lampasas county, Texas, which contract was in words and figures as follows:

DODGE CITY, FORD CO., KANSAS, August 13. 1881.

Contract entered into this day, at Dodge City, Kansas, by and between L. A. Mosty, party of the first part, and R. A. Houston, party of the second part, to wit: That L. A. Mosty, party of the first part, hereby agrees to sell and deliver unto R. A. Houston,

party of the second part, fifteen hundred dry cows, at fourteen dollars per head, same to be good, smooth, and merchantable cows, and to range from (3) three to (8) eight years old; and, furthermore, L. A. Mosty, party of the first part, agrees to brand said cows with road brand of R. A. Houston, party of the second part, and to deliver said cows at a point six miles west of Lampasas, Texas. Also L. A. Mosty agrees to deliver and sell to R. A. Houston fifty (50) bulls @ ($14.00) fourteen dollars each, said bulls to be from three to five years old, straight and smooth.

L. A. Mosty, party of the first part, acknowledges receipt of fifteen hundred ($1,500) dollars from R. A. Houston, party of the second part, as part payment on herein mentioned cattle.

Furthermore, R. A. Houston, party of the second part, hereby agrees to honor the drafts which may be drawn by L. A. Mosty, party of the first part, to the amount of thirteen thousand five hundred ($13,500) dollars, interest to be computed at the rate of ten per cent. per annum. L. A. Mosty, party of the first part, hereby agrees to deliver said cattle between the first and fifteenth day of May, 1882.

It is further agreed that the balance due on said cattle shall be paid upon their delivery. In case of the failure of L. A. Mosty, party of the first part, to comply with the above conditions and agreements between him and R. A. Houston, L. A. Mosty hereby agrees to forfeit the sum of fifteen hundred ($1,500) dollars, same to be paid over to R. A. Houston, party of the second part.

SIGNED: L. A MOSTY.
R. A. HOUSTON.

WITNESSES:
J. W. ORMOND.
R. M. WRIGHT.

That defendant required in case of the acceptance of an assignment of said contract that Buzard should pay him cash $15,000, which amount had been by him advanced to Mosty upon the contract last above set forth; and that Buzard should assume the payment of the balance which would be due Mosty upon said contract, when the cattle contracted for should be delivered; and that Buzard should pay to defendant when said cattle were

delivered, an amount equal to the difference between the price he had contracted to pay Mosty for the cattle, and the price Buzard had agreed to pay him for the same identical cattle. And as an inducement to Buzard to the exchange of contracts, the defendant then and there represented to Buzard that Mosty was good and solvent and able to perform his said contract. That Mosty was better than himself (Houston) and that Mosty at that time had twelve hundred of the cattle in the rail or ranch brand of said Mosty; that there was no doubt of the performance of said contract, as R. E. McAnulty was a partner with the said Mosty in the performance of the same.

That neither Buzard nor Hillard knew anything about the truth or falsity of these representations, but Buzard knew McAnulty, and knew he was a man of wealth, and fully able as well as willing to perform his obligations and contracts, and he felt satisfied that if the said McAnulty was a partner in the said transaction between the said Mosty and the said Houston, the said contract would be fully and strictly performed.

That on the next morning Buzard and Houston met by agreement at the office of Hinkle, and having considered the matter, agreed to accept the assignment of the Mosty contract, provided the defendant would guarantee the fulfillment of the said contract. That defendant refused to do so, alleging that at that time he would be employed in other transactions, and could not well attend to the completion of said contract by the said Mosty, and that it would be a useless thing for him to attend to the delivery of the cattle by Mosty, and then hand them over immediately, at the same time and place, to Buzard and Hillard.

But as a further inducement to said Buzard that he should take the offered assignment of the Mosty contract,

Houston proposed that he would deduct twenty-five cents per head on the number of said cattle from the price of $15.50, agreed by Buzard from himself and Hillard to be paid in the contract between the said Houston and Buzard, and would take the obligation of Buzard and Hillard to pay to him at the time of the performance of said contract by Mosty, for the sum of $1,837.50, the same being his profit on the contract with said Mosty in the sale to Buzard, less the twenty-five cents per head to be deducted.

That the said defendant then and there reiterated his representations that the said Mosty was good and solvent, and able to perform the said contract; that Mosty was as good or better than defendant, and that the said Mosty had twelve hundred head in his rail or ranch brand, and that there was no doubt of the fulfillment of the contract; and he again reiterated that the said R. E. McAnulty was a partner of the said Mosty in the transaction for the fulfillment of the said contract.

That Buzard and Hillard, acting through the said Buzard, relying upon said representation, and knowing that the said McAnulty was a man of wealth and strict in the performance of his contracts, and believing that the said defendant was an honorable and truthful man, and believing that his representations were true as to the solvency of Mosty and his capacity to perform said contract, and believing all the other representations of the defendant, and especially believing that the said McAnulty was a partner with said Mosty in the delivery of said cattle and performance of said contract with defendant, and having apprized himself by inquiring among the acquaintances of said McAnulty of his solvency and ability to perform said contract, Buzard accepted said proposition made by defendant to pay him with the money already advanced

him on the other contract, the sum of fifteen thousand dollars, alleged to have been paid by defendant to Mosty on said contract, and to execute his and Hillard's obligation to the defendant to pay him on performance of the said contract by Mosty, an additional sum of $1,837:50, and to return to him the contract he had made with Buzard for the benefit of himself and Hillard, and in lieu thereof to receive from defendant the assignment of the Mosty contract, without responsibility on him under the said contract made by defendant with the said Mosty.

That accordingly Buzard authorized the said Hinkle, who still held the contract between Buzard and defendant, Houston, to deliver the same to defendant, which Hinkle did.

That Buzard, for himself and Hillard, paid to Houston his draft in the sum of fourteen thousand and five hundred dollars, due at sixteen days after date.

That defendant discounted said draft on the next day at the bank of Thornton & Lockwood, at San Antonio, and received for same the full amount less the discount from said bankers.

That Buzard and Hillard executed and delivered to defendant their obligation for $1,837.50, to be paid when the said Mosty complied with or fulfilled said contract, which said obligation is still in the possession of the defendant. And thereupon the said defendant, by the name of R. A. Houston, executed upon the back of the said contract between him and said Mosty, his assignment thereof to Buzard and Hillard, being in the following words:

THE STATE OF TEXAS. }
COUNTY OF BEXAR. }

Know all men by these presents, that I, Robert H. Houston, party of the second part to the above and foregoing contract, for

and in consideration of the sum of fifteen thousand dollars, to me in hand paid by Buzard and Hillard, being the sum advanced by myself, R. A. Houston, in payment on the said contract, and the further sum of $1,837.50 (eighteen hundred and thirty-seven dollars and fifty cents) due upon the completion of the foregoing contract, do this day transfer and assign unto the said Buzard and Hillard all the right, title and interest which I have by virtue of said foregoing contract, it being understood that no responsibility shall rest upon me in the event that L. A. Mosty, party of the first part in said contract, fails to comply in any respect with the terms thereof.

In witness whereof, I hereunto sign my name this 1st day of November, A. D. 1881.

SIGNED: R. A. HOUSTON.

WITNESSED BY
F. G. SMITH.
J B LACOSTE.

That said contract and assignment, with the receipt of the said Mosty, dated 19th of August, 1881, and the letter of said Mosty, dated September the 28th, 1881, to the defendant, hereinbefore referred to as evidencing the payment of the defendant to said Mosty of the said fifteen thousand dollars, were then and there delivered to your orators.

And your orators aver that the representations of the defendant that the said Mosty was good and solvent and able to perform the said contract for the delivery of said cows and bulls, that the said Mosty was as good or better than the defendant; that the said Mosty had twelve hundred head in his ranch or rail brand, and that there was no doubt of the fulfillment of the contract, and the representations aforesaid of the defendant that R. E. McAnulty was a partner of said Mosty in the transaction of the fulfillment of said contract with defendant, were at the time they were made absolutely untrue; that at the time aforesaid the said Mosty was wholly insolvent; that he was not as good or better than the defendant; that he had no cattle whatever in his ranch or rail brand, or any cattle

whatever, that he was totally unable, for want of solvency and want of credit, to perform such contract; and that the representation that R. E. McAnulty was a partner of the said Mosty in the transaction of the fulfillment of the said contract between the defendant and the said Mosty was also absolutely untrue. And your orators aver that the said McAnulty was not at the time of the said assignment of the said contract, and never had been, a partner of the said Mosty in the transaction with the said defendant for the delivery of the cattle mentioned in said contract, and that he had no concern whatever with the same, and was not bound in any way for the fulfillment of said contract, as partner or otherwise.

And your orators aver, that the representations aforesaid made by the defendant to your orator Buzard was the inducement for him to deliver up the contract he had made with the defendant for the benefit of your orators, and that it was the inducement for the said Buzard to change the position of your orators with said Houston, and to pay him the money he alleged to have advanced to the said Mosty and to execute the obligation of your orators to the said Houston to pay him on the fulfillment of said contract by said Mosty $1,837.50, and to take from said defendant his assignment of said contract, with a stipulation therein that he should not be responsible thereon for the failure of said Mosty to comply with and perform the same.

And that without the said representations made by the said Houston your orators would never have delivered up the contract of the said defendant with your orator, Buzard, for the benefit of your orators, because your orators aver that the said Houston had been represented by his acquaintances to be perfectly good and solvent, and your orators believe him still to be so, and to be able to

carry out and to fulfil the same. Nor would your orators have given up the said contract with the defendant for the delivery of cows and bulls, because the said contract was of peculiar value to your orators in this, that they own and have under their control a very large tract of land of nearly forty thousand acres, fit for pasture, situated on the Nueces river, in Zavalla county, which tract of land they are engaged in fencing for a pasture for the purpose of engaging in the raising of cattle; that the cattle mentioned in the contract with defendant were of the precise character needed for breeding purposes by your orators, and were intended to be placed by them in the said pasture for that purpose, all of which the defendant well knew.

That owing to the increasing demand for such cattle they had become scarce in the market and difficult to procure, and your orators would not have yielded to the said Houston his contract to deliver cattle as aforesaid and have taken any other contract from him in lieu thereof, unless he had been assured that the contract was a safe one and certain to be fulfilled.

And your orators aver that the above mentioned statements and acts and doings of the said defendant by which your orators were induced to give up to said defendant, Houston, the contract with him and to take the assignment of the contract of said Mosty with said Houston were deceitful and fraudulent. and that they were intended by the said defendant to deceive your orators, and that they did deceive your orators to their great injury, to wit: To the extent of the fifteen thousand dollars paid to him, the said defendant, thereon, and to the further extent of ten thousand dollars, or some other large sum which your orators will have to pay in stocking their said pasture

with cattle for breeding purposes, and the probable and almost certain loss for the next year of the increase of that number of cattle in said pasture, because your orators aver that, owing to the continued increased demand for that kind of cattle for breeding purposes since the making of said contract with said defendant, Houston, on the 14th of October, 1881, the market is well nigh exhausted, and your orators do not know when the said contract for the number, quality and kind of cattle can again be procured by them for breeding purposes during the next year unless the contract made as aforesaid with the defendant, Houston, be enforced by your Honors.

And your orators show and aver that they were induced to take the said contract of said Mosty with the defendant and to take the assignment thereof by said defendant to them, in which it was stipulated by said defendant that he was not to be responsible for the non-fulfillment thereof by the said Mosty, solely on the false statements aforesaid of the said defendant, and particularly on the false statement that the said R. E. McAnulty was a partner in the fulfillment of the same with said Mosty.

Your orators, nor either of them, know anything as to the truth of the defendant's assertion of the solvency and ability of said Mosty to carry out the said contract, nor was he able at San Antonio to obtain any information thereof, but that information could only be properly secured in Lampasas county, Texas, where the said Mosty resided, which county was at a great distance from the place where the contract with said defendant was being negotiated, and they knew no person in Lampasas or in said county of Lampasas, from whom they might obtain correct information.

That your orators knew the said McAnulty, who was represented by the defendant to be a partner with the said

Mosty in the fulfillment of said contract, and knew him to be perfectly solvent, and believed he was a man of honor and strict in the performance of his engagements, and he felt satisfied that if said McAnulty was such partner, as represented, the contract would be fulfilled strictly and punctually; and in order to reassure himself he made inquiries among persons at San Antonio who knew the said McAnulty, as to his solvency, ability to fill his contracts or anything in which he was interested, and as to his character, and that the said inquiry confirmed his own opinion that he was solvent, able to fill all contracts and engagements, and was honorable in his dealings.

But your orators had no opportunity to inquire of the said McAnulty whether the representation of the defendant was true, that he was a partner, or interested in the fulfillment of the said contract between the said Mosty and the defendant.

They aver that the said McAnulty resides in Austin county, Texas, at a great distance from San Antonio; that he is often away from home, and your orators would not have known where to communicate with him on the subject.

And so your orators say they are free from blame in having taken the assertions and representations of the defendant aforesaid as true, because the defendant, so far as your orators could get information, stood fairly as a truthful and honorable man, and there was no means at hand, or by any efforts your orators could make, to ascertain the truth of said representations. And your orators show as a fact, that the said Mosty at the time of the transfer of the contract between the said Mosty and the defendant to your orators, by the defendant, was absolutely insolvent and had no property subject to be taken by his creditors;

that on the 7th of October, 1881, the said Mosty had sold and transferred all cattle and other interests in Texas and elsewhere of which any knowledge can be had to R. E. McAnulty, in payment or part payment of a debt he owed to the said McAnulty of eighty thousand dollars or some other large sum, which sale and assignment was placed on record in Lampasas county, in a few days thereafter, and the said McAnulty long before the said assignment of said Mosty by defendant to your orators was made, had taken possession of the property so sold and assigned by said McAnulty to him.

And your orators believe and charge that the said defendant, at the time he assigned the said contract to your orators, and received their money thereon, well knew of the insolvency of the said Mosty, or had had good reason to believe that he was in failing circumstances.

That the defendant had long been engaged in trading in cattle in Texas, and was well acquainted with the dealers in cattle in said State, and had many acquaintances and great facilities for obtaining information which were not possessed by your orators, they being comparatively strangers in Texas, and just engaged in establishing their pasture for the purpose of rearing cattle in Texas.

That other persons similarly interested as said defendant, who had contracts with the said Mosty for the delivery of cattle, and who had advanced money to him on such contracts, knew of the said failure of the said Mosty before the said 1st day of November, 1881, and knew the losses they had suffered were without remedy.

Wherefore your orators charge that the said transfer and assignment of the said Mosty contract with the defendant, by the said defendant to your orators, was well known to said defendant, at the time of said assignment,

to be a worthless contract, and incapable of being filled or performed by the said Mosty, or he had good reason to believe that the same was worthless.

And your orators further aver that, at the time of the said assignment of the said contract to your orators by the defendant, and the receipt by defendant of your orators' money thereon, the said Mosty was insolvent and the said contract was worthless. And your orators aver that the said defendant had already lost the money he had advanced to said Mosty upon the same, and that there was no consideration for the giving up of the contract your orators had with the defendant, and receiving in lieu thereof a transfer from defendant of the worthless contract he had with the said Mosty.

Your orators therefore bring into court the contract above referred to between the said Mosty and the defendant, that the same may be delivered up to the said defendant. They also bring into Court the receipt for money by the said Mosty to defendant, dated the 19th of August, 1881, and the letter of the said Mosty to the defendant, 28th of September, 1881, evidencing the payment of money on the said contract with the said Mosty by the defendant, that they may also be delivered to the defendant.

They also bring into Court the assignment by the defendant to your orators of the said contract between said Mosty to the defendant herein particularly described, that the same may be cancelled and held for naught, and that your orators may have decree against the said defendant, requiring him to bring into Court the contract made for the benefit of your orators by your orator Buzard with the defendant, of date about the 14th of October, 1881, that the same may be re-established as a contract between your orators and the said defendant, and that he bring

into Court the excess of money paid by your orators on the assignment of the said Mosty contract, beyond the amount that would have been due him on the contract between your orator, Buzard, for the benefit of your orators and said defendant; and that he further bring into Court the obligation of your orators to him for the $1,837.50, that it may be delivered to your orators or cancelled, and that your orators be placed in statu quo as before the said assignment was made, and restored to their rights as against the defendant.

And your orators show that they used all diligence that was possible to be, and to make the said contract with the said Mosty good, by visiting the county of Lampasas and trying to ascertain if anything could be made out of the said Mosty thereon, but he ascertained that said Mosty was utterly insolvent, and cannot and will not be able to perform the same, and that your orators immediately notified the said defendant, and offered to return the said contract to him and all papers he had received, and demanded a recission of the transaction with said defendant and a repayment of the money advanced upon the said assignment, which the said defendant refused to do.

All of which actings and doings, pretences and refusals, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises.

To the end, therefore, that the defendant may make true answer to the several matters alleged in your orators' bill of complaint, your orators pray that the said defendant may be compelled to make true, direct and perfect answer thereto, to the best of his knowledge, remembrance, information and belief, of all and singular the matters aforesaid, as fully and particularly as if the same

were repeated, and the defendant of them and every of them distinctly interrogated thereto.

Your orators pray that the contract of assignment by the said defendant to your orators on the 1st day of November, 1881, of the contract made between the said L. A. Mosty and the defendant, of date August 13, 1881, be rescinded and cancelled, and declared null and void.

That the defendant be compelled to bring into Court for cancellation the obligation of your orators to pay him $1,837.50, dated November the 1st, 1881, the same growing out of the said assignment of the Mosty contract to your orators, and that the same be declared null and void, and be cancelled.

That the said defendant be compelled to bring into Court and deliver to complainants the excess of money paid him on the 1st day of November, 1881, between the amount your orators were to pay him in the contract of your orators by your orator, the said Buzard, and the defendant, of date about the 14th of October, 1881, and the amount actually paid him on the 1st of November, 1881, on receiving the assignmnt of the contract of said Mosty with defendant.

And your orators pray that the said original contract of date about the 14th of October, 1881, between your orator, the said Buzard, for the benefit of your orators and the defendant, be brought into Court by the said defendant, and that the same be confirmed as a valid, subsisting and binding contract, by suitable decrees and orders, between your orators and said defendant, and that the same be enforced by your Honors under such terms and stipulations as may be deemed just and proper.

And your orators pray that if the said contract of fourteenth of October, 1881, between your orator, Buzard,

for the benefit of your orators and the defendant, cannot by the rules and practice of your Honors' Court, be enforced as against the defendant, that the said defendant be compelled to return to your orators the five hundred dollars paid on the said contract about the 14th day of October, 1881, and the fourteen thousand five hundred dollars paid by draft in favor of the defendant on the assignment of the contract between said Mosty and the defendant by the defendant to your orators on the 1st day of November, 1881, with interest on said sums, and that your Honors will further decree that the defendant shall pay to your orators the damage of ten thousand dollars, which they have sustained by reason of the fraudulent obtaining of said contract for the benefit of your orators, made by your orator, Buzard, with the defendant, and by reason of the other injuries that have resulted to your orators therefrom, as herein set forth.

And your orators pray that they may have against the defendant such further orders and decrees as to equity belongs under the facts and circumstances herein set forth, in order that full justice may be done to your orators in the premises.

May it please your Honors to grant unto your orators a writ of subpœna to be directed to the said Robert A. Houston, the defendant, thereby commanding him at a certain time, under a certain penalty therein to be limited, personally to appear before this honorable Court, and then and there, full, true, direct and perfect answer make to all and singular the premises, and further to stand, to perform, and abide such further order, direction and decree therein, as to this honorable Court shall seem agreeable to equity and good conscience.

And your orators will ever pray, etc.

The defendant for his further answer to the complainant's petition, his first answer having been excepted to and the exceptions sustained:

1. Denies that he executed any agreement or memorandum, as set forth in complainants' bill, as under date of October 14, 1881; denies that the contract, agreement or memorandum which was made by him and Buzard has been in substance or correctly set out in complainants' bill.

2. He avers that exhibit "A," attached to his answer on page 105 of Trans., and set forth in abstract of testimony of B. F. Buzard, was the only contract or memorandum for a contract which he ever made with Buzard.

[Trans., p. 25.] That said instrument was not intended as a final contract, but was a mere memorandum or informal outline of a contract which was to be entered into by this defendant and said Buzard, on the Tuesday next thereafter. He attaches the original to his answer and asks that it may be treated as a part thereof, and marked same "Exhibit A."

3. He denies that he was informed or knew that Buzard was contracting with him on account of Buzard and Hillard; or that he was informed or knew of the special purpose for which said Buzard desired to purchase said cattle; or that any mention whatever was made at the time to defendant by said complainant, Buzard, or anyone else, the fact of his having a partner in said transaction, and Buzard signed said informal memorandum with his individual name.

4. He denies that said informal memorandum ever purported to set out that defendant was to contract, sell and deliver to said Buzard fifteen hundred cows and fifty bulls, or that it specified that the cows should be good, smooth

cows, from three to eight years old; but that said memorandum merely recites that defendant agreed to make a contract on the Tuesday next thereafter, to deliver to said Buzard fifteen hundred head of cattle, cows and bulls, without specifying the number of each kind, the age, condition or character, or any other description of said cattle, all of said matters being left for further negotiation and determination when said parties came to settle the terms of the said contract contemplated by the said memorandum.

5. He avers that by way of explanation that he could not meet Mr. Buzard, on the next Tuesday and sent Mr. Walker to represent him and arrange another day for him to meet Buzard. The time was arranged by Buzard and Mr. Walker to be some time between the 10th and 15th of November, 1881, and that Buzard should notify him the exact day.

6. That he and Buzard met accidentally at San Antonio on the 31st of October, 1881, late in the evening and agreed that in as much as they were both together, they could settle their said matter without waiting for the time named by said Walker and Buzard.

7. That during this meeting defendant proposed to Buzard that Buzard should purchase a contract from defendant, which he had with L. A. Mosty. This defendant proposed that Buzard pay him the $15,000, which he had advanced to Mosty on said contract, and give him a note for defendant's profit on said Mosty contract, when the cattle were delivered by Mosty to Buzard, rating the cattle at $15.50 per head, and that said Buzard, after looking at and carefully reading said Mosty contract, asked defendant to give him until next day to look further into the matter, and to make inquiries concerning it.

8. That on the next day said Buzard, after again reading over said Mosty contract, proposed himself to take an assignment of the Mosty contract, if defendant would guarantee the performance of said contract by the said Mosty; which defendant refused to do, and this defendant then proposed to said Buzard to abate twenty-five cents per head on the price of said cattle, if the said Buzard would, for that consideration, take an assignment of said contract, and release defendant from all liability thereon, and said Buzard, after duly considering same, accepted the assignment of said Mosty contract, and defendant then believed, and now believes, that in the meanwhile Buzard had made due inquiry about the matter.

9. That defendant made a full statement of the new proposition, and stated to Buzard on evening of October 31, 1881: "I have a new and different proposition to make to you," and Buzard, after having read and considered the matter, asked further time, that he might consider the same, and satisfy himself that the Mosty contract was such as he was willing to be assignee of, and after duly considering same, and careful deliberation, and in exercise of his own judgment, he accepted the same; and returned the memorandum contract for cancellation. That he never before or after the assignment of said Mosty contract to the complainants, made any false representations of any character whatsoever to said Buzard or to anyone else, as to the solvency or pecuniary condition of the said Mosty, or as to his (Mosty's) relations as a partner to the said McAnulty.

10. The defendant, further answering, denies that any statements whatsoever made by this defendant or anyone else to the said Buzard, either as to the solvency of the said Mosty or of his partnership with the said McAnulty,

formed any inducement whatever to the said Buzard to make the said contract with this defendant as to the said Mosty cattle.

11. But that the said Buzard declined to rely on any statements made by this defendant, took time to consider the matters and inquire into the same, and finally acted upon his own judgment, without relying upon the statements of this defendant or of anyone else. This defendant admits that during the progress of the negotiations on the 31st of October and 1st of November, 1881, that this defendant more than once in the course of conversation between himself and said Buzard, and in response to the inquiries of the said complainant, Buzard, replied to him, stating in substance the solvency of the said Mosty, and also stating his alleged partnership with the said McAnulty to the said complainant, Buzard, but the defendant expressly denies that he made the statements as set forth in the complainants' bill on the subject of the solvency of the said Mosty, and his ability to carry out his said contract, and his partnership with the said McAnulty, to the said complainant, Buzard, or anyone else, as facts within the personal knowledge of this defendant; nor were they so understood by the said Buzard, nor were they intended by this defendant to be so understood. Defendant, further answering in this behalf says, that while he expressly denies the averment made in the bill as to his stating as facts anything as of his own knowledge as to the solvency of the said Mosty, he says the true facts as to what passed between the said complainant and this defendant when the said contract was made, on the 31st of October and 1st of November, 1881, are as follows, and are here repeated, being advised by counsel that their repetition in this connection is necessary and expedient to this defense.

12. This defendant denies that he at any time during said negotiations for the transfer of said contract with L. A. Mosty to complainants, represented to said Buzard or stated as a fact within the knowledge of defendant that L. A. Mosty was as good or better than defendant, that L. A. Mosty was solvent and able to perform his contract, or that said Mosty had twelve hundred head of cattle in his rail or ranch brand, or that R. E. McAnulty was a partner of said Mosty, and bound upon his (Mosty's) contract, but defendant admits that in this connection he did say to said Buzard, at some time during the progress of said negotiation, that he (the defendant) believed said Mosty to be good and solvent and able to perform his contracts.

13. That it was generally understood that said Mosty had handled over thirty thousand head of cattle during the season of 1880, and that that was more cattle than he (defendant) had ever been able to handle. That defendant also told said Buzard that said Mosty had told defendant that R. E. McAnulty was a partner with him in the cattle business. That during said conversation said Buzard said he did not want Eastern Texas cattle, when defendant said to him that Mosty had told him (defendant) that he (Mosty) had about twelve hundred head of cattle in his rail or ranch brand, and defendant supposed from this statement of Mosty that he, Mosty, expected to put these cattle in upon the defendant's contract and that they were Lampasas cattle; but defendant says that this last conversation as to said cattle and their number had no reference to the solvency of said Mosty, but related solely to the character of cattle which said Buzard would probably receive upon said Mosty contract, and defendant believes and so states the fact to be that this conversation occurred after the assignment of the said Mosty con-

tract had been made, although he admits his recollection as to the time when it occurred is not perfectly accurate.

14. And for further answer defendant says that it was true that he at that time believed said L. A. Mosty to be good and solvent, and able to perform his contracts; that it was true that he (defendant) believed said L. A. Mosty to be as good or better than he (the defendant) was. That it was publicly stated by many persons and believed by this defendant and many others that the said L. A. Mosty had handled over thirty thousand head of cattle, and had made large profits thereon, and that it was true that defendant had never been able to handle such a large number of cattle. That it was generally known by many persons in Gonzales county, where defendant resides, that said Mosty was a large dealer in cattle, and perfectly good for his contracts; and as evidence of this, defendant and others of his friends and acquaintances in Gonzales county, had advanced to said Mosty large sums of money, amounting to thousands of dollars, upon contracts for the future delivery of cattle, requiring no security from the said Mosty for the same.

15. That defendant did believe, both at the time he made said contract with said Mosty and at the time he assigned the same to complainant, Buzard, that said Mosty was good and able and willing to perform his contract with this defendant. Defendant denies that it was known to defendant at the time he assigned said contract to complainant, nor was it known to anyone from whom defendant might have acquired the information, that Mosty was in fact at that time not in a condition to perform said (his) contract with defendant, but in fact at the time of the assignment of said contract to complainants that the said Mosty was generally regarded and believed to be solvent and able to perform his contracts, and the

contrary was not known and could not have been known at the time to the defendant when he assigned said contract to complainants, by the use of any means of information at his command.

16. Defendant further says all the means and sources of information open to him as to said Mosty were also equally open to complainants for information in regard to the solvency of said L. A. Mosty; and that the defendant had no knowledge or information in regard to the solvency of said Mosty that he did not, in good faith, honestly and fully and truly then communicate to complainants. Defendant further says that when he stated to complainants that L. A. Mosty had told him (defendant) that R. E. McAnulty was a partner with him, said Mosty, in his cattle contracts, that it was true that said Mosty had told him, defendant, and that defendant believed the same to be true, as stated by said Mosty.

17. Defendant says further, that he is informed and believes that the statement made by said Mosty was, in fact, not false at the time it was made, and that said R. E. McAnulty was, in fact, at that time, to some extent, a partner with said Mosty in his, said Mosty's, cattle contracts. As to what were the exact conditions and limitations of said partnership this defendant was not advised, but he is informed and believes, and so states the fact to be, that in August, 1881, some sort of partnership existed between the said Mosty and the said McAnulty.

18. Defendant further says that he is informed and believes that the said contract of partnership by and between said L. A. Mosty and R. E. McAnulty was made and entered into on or about the 10th day of August, 1881, and continued until about the 7th day of October or 7th of November, 1881, and that on or about the 7th

day of October or 7th of November, 1881, said parties dissolved and attempted to settle said partnership by said Mosty assigning to said McAnulty all the assets of said partnership, amounting to about four thousand head of cattle, which had been bought by money advaneed to said Mosty upon cattle contracts, and by assigning to said McAnulty contracts for the purchase of cattle made by the said Mosty, upon which said Mosty had advanced all or a part of the purchase money, which assets so turned over to said McAnulty defendant is informed and believes was reasonably worth from one hundred and twenty-five to one hundred and fifty thousand dollars.

19. Further answering in this behalf, this defendant denies that he has resided near the said L. A. Mosty, and denies that he had any knowledge whatever of said Mosty's financial condition other than his general reputation at that time for solvency among stock men.

20. That defendant resided about one hundred and twenty-five miles from where said Mosty resided and has carried on a business.

21. Defendant says that his own cattle business has been, to a great extent, in Gonzales and the coast counties of Texas; that complainant, before entering into said contract with defendant, took such time as was desired by him to be taken to inquire into the solvency of the said Mosty, and could have taken as much time as he desired to take, but the complainants having made all the inquiry they wished to make, and having obtained such information concerning Mosty and his said solvency as was regarded by them as sufficient, and having taken all the time they desired, and relying upon their judgment, and having been put fully in possession by this defendant of all the facts in his knowledge, acted in this matter for themselves and on their own judgment.

22. And this defendant for further answer, says he expressly denies that he ever, at any time, as an inducement to the said complainant, Buzard, to enter into the contract of November 1, 1881, or for any purpose, represented to the complainant, Buzard, that the said Mosty was good and solvent, and able to perform his said contract; that he was better than the defendant, and that the said Mosty at the time had twelve hundred head of cattle in the ranch or rail brand of said Mosty; that there was no doubt of the performance of the said contract, as R. E. McAnulty was a partner with the said Mosty in the performance of the same. And this defendant avers that a true, full and complete statement of what in fact passed at the time of said negotiation of October 31, 1881, and November 1, 1881, between the defendant and the said Buzard, has been heretofore fully set forth in this present answer, and is referred to in this connection.

23. Defendant, further answering, expressly denies that at the time he refused to guarantee the fulfillment of the Mosty contract, and when the said complainant agreed to release him from the said guaranty in consideration of this defendant deducting twenty-five cents per head on the number of said cattle, that he, this defendant, then and there reiterated, or in any other manner made any representation of his, or anyone else to said Buzard, that the said Mosty was good and solvent and able to perform the said contract. That he was as good and better than this said defendant; that said Mosty had twelve hundred head of cattle in his rail or ranch brand; that there was no doubt of the fulfillment of the contract; that R. E. McAnulty was a partner with the said Mosty in the fulfillment of his contract.

24. But, on the contrary, this defendant denies the same, and says that the averments in the bill to that effect

are not true as alleged, but, on the contrary, this defendant avers that throughout the whole of said transaction with the said Buzard he acted in the utmost good faith, and on the 31st of October and November 1, 1881, he fully believed that the said Mosty was good and solvent, and had no notice or knowledge to the contrary, and in so stating his belief to Buzard, was sincere and had no design or purpose to injure or deceive the said complainant or anyone else, and that he never knew or heard of or had any reason to suspect the then insolvency of the said Mosty until some time after the said contract with the said complainant was made; and this defendant in this connection further says that at the time of the assignment of said contract on the 31st of October, and 1st of November, 1881. he firmly and honestly believed that the said Mosty was good and solvent, and abundantly able and willing promptly and in the utmost good faith to carry out completely, both in letter and spirit, the terms of said contract; and in all his statements on this subject to the said complainant, Buzard, he acted in the utmost good faith, and had he known at the time or had reason to suspect that the said Mosty was insolvent or unable to carry out fully his said contract, he would not have assigned the same, but would have promptly taken such steps as he would have deemed best to secure his rights under said contract, in whole or in part.

25. And now comes the said defendant, and for further answer, he denies the statements as set forth in the complainants' bill of complaint that the representation of the defendant that said Mosty was good and solvent and able to perform said contract for the delivery of said cows and bulls; that the said Mosty was as good or better than the defendant; that the said Mosty had twelve hundred head of cattle in his rail or ranch brand; that there was no

doubt of the fulfillment of the contract, and that R. E. McAnulty was a partner of said Mosty in the transaction with the defendant, were at the time they were made absolutely untrue; that at the time aforesaid the said Mosty was wholly insolvent; that he was not as good or better than the defendant; that he had no cattle whatever in his ranch or rail brand, or any cattle whatever, and that he was totally unable, for want of solvency and credit, to perform said contract.

26. And further answering in this connection, he says he is informed and believes it to be true, and admits that on the 31st of October and 1st of November, 1881, the said Mosty was in fact, insolvent, and not as good as this defendant; but he denies that he stated the contrary to said complainant, Buzard, and he asserts the financial condition of the said Mosty at that time to have been as well and fully known to the complainant as to this defendant, and that defendant made no concealment or false or fraudulent statement of any kind whatsoever at that time or any other time to the said Buzard in regard to said matter or any other matter.

27. This defendant, further answering, says he expressly denies that he made any such false and fraudulent representations as to the said partnership relation of the said McAnulty to said Mosty to the said Buzard, as is alleged in said bill of complaint.

28. And this defendant further says that he denies the averment in the said bill as to said McAnulty never having been a partner of the said Mosty, and denies the same as absolutely untrue, and says he has been informed and believes, and so states the fact to be, that during the year 1881—some time in August, 1881—and prior to that date, and upon the 7th day of October or November,

1881, that the said McAnulty was, in fact, associated in the cattle business and largely interested therein with said Mosty; and he is informed and believes, and so states the fact to be, that a partnership of some kind in the cattle business did, in fact, exist between them, but the precise terms and conditions of the same are not known to this defendant; and in this connection this defendant expressly denies that he fraudulently or falsely represented to the said Buzard at any time whatever that such partnership existed. He expressly denies that he stated to said Buzard as a fact that said partnership ever existed, and the averment in the bill to that effect is false and untrue; and he further denies that said Buzard relied upon any representations made to him by this defendant, or any kind whatever, either as to the partnership of the said McAnulty or as to any other matter relating to the ability and capacity of the said Mosty to perform and carry out his said contract.

29. Defendant, further answering, expressly denies that he ever made any false representations to the said Buzard as to the solvency of the said Mosty.

30. This defendant, however, admits that from the facts that have come to his knowledge subsequent to said trade with said complainant Buzard, that the said Mosty and defendant to complainant, Buzard, by the defendant, was insolvent, and had no property subject to be taken by his creditors.

31. That on the 7th day of October, 1881, the said Mosty had sold and transferred all cattle and other interests in Texas and elsewhere, of which any knowledge can be had, to R. E. McAnulty in payment or part payment of a debt he owed to said McAnulty of eighty thousand dollars, or some other large sum, and the said McAnulty,

before the assignment of the contract to complainant by the defendant had taken possession of the property so sold and transferred by Mosty to him. But this defendant denies that he represented the contrary to be true, or that he knew the said facts to exist on October 31, 1881, and November 1, 1881, the full facts as to the insolvency of the said Mosty, and when the same came first to the knowledge of this defendant, are set forth in the previous parts of this answer, and are referred to in this connection. This defendant has no knowledge of when the said deed to the said McAnulty was recorded in Lampasas county, or whether it was recorded there at all, but he denies that it was recorded on the 7th, 8th, 9th or 10th of October, 1881; and in this connection this defendant files herewith a copy of the final settlement of said Mosty and McAnulty, marked "Exhibit B," and prayed to be taken as part of this answer.

32. Defendant, further answering, says that all the terms of the said contract and of the whole cattle transaction between the said complainants and the defendant are in writing, and all the inducements and consideration for the same moving from and to each party are fully and distinctly set forth therein; and he says that he has been advised by his solicitors that no oral statement made before or after the execution of said contract can be used to vary or change the written terms of the same.

33. Defendant, further answering, says that he is advised by counsel, and respectfully submits to the Court, that this said Court, sitting as a court of equity, cannot take cognizance or jurisdiction of the same, as it appears from all the averments of said bill and from this answer, that the said complainants, if they have in any way been

injured or damaged, have a full, complete and perfect remedy at law, and have their action on said contract, and show no grounds of equitable relief.

34. And this defendant, further answering to said bill of complaint, says he is advised and here suggests that the said complainants have in no manner suffered any damage or injury by reason of matters and things set up and alleged in said bill of complaint, and cannot have a decree for the same against this defendant.

35. And, further answering, this defendant says that, from the averments in said bill of complaint, it appears, and he is so advised, that the said L. A. Mosty is a proper and necessary party to said suit, and upon the advice of counsel he respectfully suggests in this behalf a want of parties defendant to said suit, by reason of the failure of the said complainants to make the said Mosty a party defendant to the same.

36. And this defendant submits to this Honorable Court that each and all and every the matters in the complainants' bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainants are not entitled to any relief from a court of equity, and this defendant hopes that he shall have the same benefit of this defense as if he had demurred to said complainants' bill.

37. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or thing, in said complainants' bill of complaint contained material necessary for this defendant to make answer unto, not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied, is true, to the knowledge and belief of this

defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed, and his reasonable costs and charges in this behalf most wrongfully sustained.

## *FIRST POINT.*

This cause was instituted for the purpose of cancelling one contract and reinstating another, and readjusting certain payments on the grounds of fraud and misrepresentations, and the demurrer interposed by defendant to the jurisdiction of this Court is unfounded.

The chancery rule in England is settled that equity has an undoubted jurisdiction to relieve against every species of fraud and misrepresentation.

*Chesterfield vs. Jaussen, 2 Ves. Sen. 125. 1 Ath., 301, 1 Eg. Lead. Cas., 773 (4th Amer. Ed.)*

The same rule governs in the national Courts of the United States whenever there is not a plain and adequate legal remedy at law to relieve against the same fraud or misrepresentations.

Lord Hardwicke, in Chester vs. Jaussen, defines fraud in the following language:

> First, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case.
>
> Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man *in his senses*, and not under *delusion*, would make on the one hand, and as no *honest* and *fair* man would accept on the other, which are inequitable and unconscientious bargains.

The note to Section 875 of Pomeroy's Equity Jurisp. says:

> It is finally settled that at law there can be no fraud without moral culpability; but in equity even actual fraud may exist with-

out the knowledge and wrongful intent which constitute immorality at law. Furthermore the phrase "*constructive fraud*," or "*equitable fraud*," has been constantly used by our Courts from the earliest day

Justice Story and Mr. Snell, both able writers, say:

The essential fact in actual fraud is untruth. In the law it must be wilful—a falsehood; in equity it may be, but is not necessarily, wilful. In constructive fraud there is no necessary untruth.

An examination of the following cases will convince the mind that defendant's demurrer is not well taken.

*Grand Chute vs. Vinegar, 15 Wal., 373.*
*Oelrich vs. Spain, 15 Wal., 211.*
*Ins. Co. vs. Bailey, 13 Wal., 616.*
*Janes vs. Bolles, 9 Wal., 369.*
*Watson vs. Sutherland, 5 Wal., 74.*
*Boyce's Ex. vs. Grundy, 3 Peters, 214.*
*Crane vs. Bunnel, 10 Paige, 333.*
*Bank vs. Rutland, 28 Vt., 470.*
*Pomeroy's Eq. Jurisp., Sec. 138, 140 and 179.*

Equity will relieve against fraud, although perhaps the party perpetrating the fraud, keeping within the limits of the strict law, so as to be sustained by the law courts, had committed some unconscientious act or breach of good faith, and had thereby obtained an undue advantage over another, which advantage, even though legal, equity would not suffer him to retain.

At law it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be wilful, in other words, should be knowingly and intentionally done by the party; but it is not essential in equity that there should be a knowledge of and an intention to obtain the undue advantage which results.

*Pomeroy's Eq. Jurisp., Sec. 873 (Vol. 2).*

## *SECOND POINT.*

There is no controversy about the following facts:

1. The memorandum contract (p. 105 Trans.) was entered into on October 14, 1881, by B. F. Buzard and Robert A. Houston.

2. The parties were to meet on the next Tuesday and formulate a contract in substantially the same terms.

3. On account of illness of Houston the time of meeting to formulate this contract was postponed indefinitely; but to some time between the 10th and 15th days of November, 1881.

4. That Buzard and Houston met by chance at San Antonio on the night of October 31, 1881, and both agreed that inasmuch as they were both there, it would be useless to wait until the 10th or 15th of November to meet again, and that they would proceed to formulate that memorandum contract into one containing proper covenants, stipulations and the same terms as the memorandum.

5. That this meeting took place late at night, and as both parties were to remain at San Antonio during the next day, it was agreed between them to meet the next day at Major Hinkle's office and close up their contract; but before parting that evening, Houston made a proposition to Buzard to sell him the Mosty contract, as a new proposition, as he claims, or a proposition to assign to Buzard the Mosty contract, in lieu of the contract already begun, and contained in the memorandum contract, a Buzard claims.

6. This method of contracting in writing was the usual and customary mode of dealing in cattle for future delivery among Texas cattle men at that date, and still is. The kind of contracting was in no wise unusual among cattle men.

7. It is claimed by defendant that Buzard agreed to give him an answer the next morning whether he would take an assignment of the contract of Mosty or not (p. 85 Trans.), and it is claimed by Buzard that he handed the Mosty contract back to Houston and answered that he would see about it in the morning.

It is apparent that the minds of the parties had met upon the first contract, to bind which the memorandum had been made in writing, and a portion of the consideration had been advanced.

In this condition of affairs we find the parties on October 31, 1881, when they agree to meet on the morning of November 1, 1881, and the one make the formal written contract, and the other pay the balance of the advance consideration agreed upon. Every condition was agreed upon, the terms all understood, and the parties stood ready and able to consummate it, so far as Buzard was concerned, at least.

On this same evening there was a proposition made by Houston to make a new contract, as he claims, in these words:

> If you will take this Mosty contract off of my hands and release me entirely, I will deduct twenty-five cents a head off of each cow and bull. (p. 85 Trans.) I told him he ought to have known Mosty; that he was a large cattle dealer, and I had heard it said frequently he handled more cattle in 1881 than any Texas man on the market. He handed me the contract back, and said: "I will give you an answer in the morning." (P. 85 Trans.)

Buzard testified: "Mr. Houston proposed that, instead of completing the contract as we had agreed on, to transfer a contract between him, Houston, and Mosty for about the same number of cattle—about fifteen hundred head of cattle and fifty bulls. He stated that they were the same cattle he had sold me, and that at the time he would have these cattle to deliver he would be busy putting up cattle in another part of the state, and that it would be almost impossible for him to be there at that time. That he would have to receive the cattle from Mosty and then immediately turn them over to me, and that I could just as well receive them from Mosty as he could. He then handed me the contract between him and Mosty, and, after reading the contract over, I answered that I would see about it in the morning. On the evening of October 31st he stated that the contract was good; that Mr. Mosty was a large dealer in cattle and fully able to fill the contract."

Up to the period when the parties separated to meet the next morning there seems to be this difference between them only, according to their own testimony, standing uncorroborated or impaired by other evidence, to wit: Houston claims that he, on that evening, made the whole proposition to transfer or sell the Mosty contract, including the proposition of a clear release from liability of himself under it, and the proposition to make the 25 cents reduction in the price of the cattle, but admits that he said he had frequently heard it said that Mosty handled more cattle than any other Texas man in the market in 1881; while Buzard claims that the transfer of the Mosty contract in lieu of the completion of the other contract was proposed with the recommendation that Mosty was a large cattle dealer and fully able to perform his contract, and that the contract was good and would

be filled, but that nothing was said that night about a transfer of the Mosty contract without recourse on Houston; and this is the only difference between the parties as to what occurred prior to their meeting on the morning of November 1st at Major Hinkle's office. It is not disputed that they met at Hinkle's office on the morning of November 1st, 1881, at which time nothing had been agreed upon which would in anywise change the relations of the parties under the memorandum contract.

Buzard testified concerning what occurred at that meeting. He says: "On the morning of November 1st we met in Major Hinkle's office, when Mr. Houston again urged the transfer of the Mosty contract, and that it would be impossible for him to be in Lampasas at the time to receive and deliver the cattle, and that if I would take that contract instead of completing the contract as we had agreed, and pay him fifteen thousand dollars that he had advanced to Mosty on the contract, he would let me have the cattle at fifteen dollars and twenty-five cents per head, and me pay him the difference between his contract with Mosty and fifteen dollars and a quarter, which would be one dollar and twenty-five cents per head; that he would be satisfied with making that profit on the contract by not having to go and handle the cattle. Houston gave as a reason for wishing to change the contract that he was handling so many cattle, and was so busily engaged all the time, that it would be almost impossible for him to go and receive these cattle. He also stated that it would be an expense of going there to receive the cattle, and the loss of time to him would be about as much as twenty-five cents a head. When Houston made this proposition, on the morning of November the 1st, I objected to taking the assignment of the Mosty contract, for the reason that I did not know Mosty or his financial standing. Houston

assured me that Mosty was good and solvent and able to fill the contract, and that R. E. McAnulty was the partner of Mosty, and that he was also good. He said McAnulty was Mosty's partner in this contract. Houston stated that Mosty was good and handled more cattle than he (Houston) did, and more able to fill his contracts than he was. I was satisfied that McAnulty was solvent. I knew of his solvency. I then stated to Houston that I would take that contract if he would guarantee the fulfillment of it; he said he would not guarantee that or any other man's contract, and again asserted that Mosty was good and McAnulty also, and asked Major Hinkle if such was not the fact.

"I asked Hinkle what he knew about the parties. He said he considered Mosty good, and that R. E. McAnulty was as good ffnancially as any cattle man in the state, and that if McAnulty was Mosty's partner in that contract he didn't think a better contract could be made.

"Houston then stated that he knew McAnulty was a partner, as McAnulty had told him so, and that there would be no question about the fulfillment of the contract, and, he again repeated, his only reason for wanting to assign that contract instead of completing the other was his inability to go and receive the stock; that he knew Mosty had most of the cattle then on the range; that about twelve hundred of the cows were Mosty's own ranch cows, with Mosty's rail brand on them; that the balance of the cows were already bought by Mosty, or would be bought by him in Lampasas county, and all would be ready to be delivered on or about the first of May, 1882.

"I then said to Mr. Houston that I did not know if Mosty was good or not, but that I knew he (Houston) was, and that if the representations were as he had made

them I would take his word for it and take the assignment of the Mosty contract instead of the contract we had agreed on, &c." (pp 49 and 50 Trans.)

Major Hinkle, who was the admitted agent of Houston in this transaction, substantially corroborates the statement of Buzard above set forth, in all material particulars. He testified: "This is the memorandum contract to which I have referred. It is in my hand writing. I advised Buzard to buy the cattle mentioned in this memorandum contract, because Mr. Houston had told me that the cattle were then nearly all gathered and then on hand in Lampasas county, and that R. E. McAnulty was Mosty's partner in that contract for delivery. The next Tuesday Houston failed to put in an appearance, as he had agreed to in the memorandum contract, and he (Houston) was absent for some ten days or two weeks. At the end of that time, ten days or two weeks, Houston asked me to get Buzard to let him off from the contract, and to take his original contract with Mosty in lieu of it. As Captain Buzard was present or in the city, I got him and Houston together, and Houston told him that as his business would prevent his giving his personal attention to the delivery of the cattle, he would deduct twenty-five cents a head, if Buzard would substitute Mosty's contract in place of his. Buzard asked me if Mosty's contract with Houston was good. Houston answered, he being present, that R. E. McAnulty was a partner to the contract, and that most of the cattle were gathered and then in the rail brand in Lampasas county. Based on that statement, I advised Buzard to take it. Mr. Houston then paid me my commission, and I had nothing further to do with it. Houston told me that McAnulty had told him himself that he was a partner of Mosty. Houston said that Mosty was as good financially as he was. All

this conversation occurred in the presence of Captain Buzard. Captain Buzard said he didn't know anything about Mosty; that he knew Houston was good, and told Houston he only made the transfer to accommodate him (Houston). Buzard told Houston that he transferred that contract, relying on Houston's statements that both McAnulty and Mosty were interested in the contract, and were pdrfectly responsible. (P. 63 Trans.)

"When Houston spoke of McAnulty as being a partner of Mosty, he said that McAnulty and not Mosty had told him so." (Line 16, p, 64, Trans.)

"I had an interview with Buzard the night before the transfer of the Mosty contract was agreed upon; Houston was present at this interview; the transfer of the Mosty contract was then spoken of; I believe I was the only party, though, who spoke of it. Nothing was agreed upon that night in reference to the transfer. Buzard said he would like to have a talk with me and see what I thought about it. The matter was postponed until next day, the whole conversation and trade.

"Buzard did not say he would give him an answer next morning; Buzard did not make his appearance at my office the next morning before Houston. I saw Houston and had a talk with him the next morning before I saw Buzard. Buzard came in while Houston and myself were talking. The trade was then closed in that interview. I think Buzard knew something of the financial standing of McAnulty; I think he knew him to be perfectly good as well as myself. I gave Buzard advice while I was acting as the agent of Houston, because he was a stranger in the State, and *because Houston asked me to induce him to make that transfer.* I would not have given him the advice I did if I had not known

McAnulty to be perfectly good. *I did not believe Mosty to be good;* also, I didn't believe the contract was *worth a cent unless McAnulty was on it.* (3d, 4th and 5th par. on p. 64, Trans.)

"I told Buzard that as Houston said the cattle were gathered and in the rail brand, and were then in Lampasas county, and R. E. McAnulty was a partner to the contract, I considered the contract good. I did not tell Buzard that the Mosty contract was not good unless McAnulty was on it. Houston paid me twenty-five dollars for my commission in drawing up that contract. He didn't pay me any commission for making the sale; he paid me for my commission and assistance generally; he paid me the amount I mentioned in cash. Buzard paid me nothing for advising and assisting him; *I was acting as the agent of Houston, and not as the agent of Buzard.*" (Commencing on last line p. 65, Trans.)

Mr. Houston in his answer denies every allegation of the bill, and in his testimony contradicts all the testimony of both Captain Buzard and Major Hinkle. In his answer he admits having made similar representations, but claims they were all made as opinions, and as hearsay from Mr. Mosty. He admits Mosty's insolvency; but claims that he was ignorant of it at the time of the transfer of the Mosty contract. He denies that he stated that McAnulty was a partner of Mosty in the fulfillment of that contract; but admits that he said that McAnulty was a partner with Mosty in the cattle business generally, and insists that this was true; and claims that he stated that Mosty and not McAnulty had told him of this partnership.

Mr. Houston claims that the only considerations and inducements made by him to Buzard to accept this transfer instead of the fulfillment of the original contract were

the reduction of twenty-five cents per head on the cattle and the accrued interest on the fifteen thousand dollars which had been advanced by him to Mosty on the contract to be assigned. He admits that Buzard said at the time of their last meeting in Hinkle's office on November 1st, 1881, that "he did not like to make a trade of that kind much; but knew I was good for the amount of money he had to advance, and Mosty he did not know know anything about." (7th line, p. 86, Trans.) "He said he did not know if Mosty was good or not. I told him I considered him good; that I thought he was good for his contracts; that he had made two contracts of the same kind with friends of mine in my county, and the parties had told me that Mr. Mosty was a gentleman, and carried out his contracts with them perfectly. He asked me who the parties were. I told him. * * * I told him I considered him as good as myself, as he had handled twice as many cattle in 1881 as I had. I told Buzard that Mosty had told me, as we were coming from Kansas together, that he was a partner of R. E. McAnulty in all their cattle dealings; that he said they were partners, but the contract did not show they were partners, but Mosty had told me they were partners." (Paragraphs 2d and 3d, p. 86, Trans.)

"I never offered to sell the contract, without recourse, to any one except Buzard. The only reason given by Millett why we couldn't trade for the Mosty contract was that I couldn't deliver them in the fall, and he offered me less money than the cattle cost me." (Trans., bottom of p. 87 and top of p. 88.)

On cross-examination Mr. Houston testified: "When I left home to come to the fair I had no idea of closing the original contract at that time, because I had no idea I would then meet Buzard, as the arrangement had been

made with Walker to meet me between the 12th and 15th of November, and this was the 31st of October. *When I left home to come here I did not come to sell the Mosty contract; I came to attend the fair. I didn't expect to sell the Mosty contract on this trip to anybody, as I had sold the cattle to Buzard, and they were his cattle.* The first contract I considered a sale of the Mosty cattle to Buzard, and I *offered them to no one else.* The Mosty cattle were the cattle of the first trade. I told him they were Lampasas cattle; those were the only cattle of that description I owned in Lampasas county. I got here between seven and eight o'clock on the night of October 31st last. * * * (Trans., p. 88.)

"We were at Hinkle's office about ten or fifteen minutes. Major Hinkle was there a part of the time, *and told Buzard that Mosty was good and solvent*, and did most of the talking himself, and told Buzard he knew Mosty better than I did. Hinkle had a good deal to do with the trade, and advised Buzard to take the assignment. He introduced Buzard to me. I had never known Buzard before, and Hinkle said he had sold the cattle to Buzard before Buzard and I spoke about the subject. This was in reference to the first contract. Hinkle was nobody's agent in the sale of these cattle that I know of. I told him if he could sell the cattle to do so. I told him after the sale was made that I would give him a suit of clothes, and he came back and said he needed the money more than he did the clothes, and I then paid him twenty-five dollars in money. I saw Hinkle on the night of October 31st, 1881. *I did not tell him on this night about my new proposition to Buzard.* I heard him and Buzard speaking privately about it. I gave Hinkle twenty-five dollars for the first trade. I heard some of the conversation between Buzard and Hinkle.

If Buzard had not accepted the transfer of the Mosty contract, I was ready to close up the original contract on the morning of November 1st, and I told Buzard so. Our negotiations were not at an end concerning the first contract until Buzard agreed to accept the assignment of the Mosty contract and release me from the first contract. Buzard agreed to accept the assignment of the Mosty contract about 9 o'clock on the morning of November 1st. I don't remember if Buzard agreed to accept the transfer of the Mosty contract before or after the conversation with Hinkle, on that morning before referred to, in which Hinkle spoke concerning the solvency of Mosty. I did not tell Buzard before he agreed to accept the transfer of the Mosty contract that Mosty was as good or better than I was. I told him that he ought to be as good as anybody, from the number of cattle he claimed to have handled in 1881. (Commencing on the 38th line on p. 88, Trans.)

In answer to question Mr. Houston said: "I did not tell Captain Buzard before he agreed to accept the assignment of the Mosty contract that I knew the Mosty contract would be filled because Mosty had then twelve hundred—or the most of the cattle on his ranch or range in Lampasas county—in his ranch or rail-brand, but that Mosty told me there would be about twelve hundred of these cattle in his ranch or rail-brand. The rail-brand of Mosty is a long bar running from the shoulder towards the flank, from a foot to two feet long." (First question and answer on p. 89, Trans.)

In answer to question he said: "I never did tell Captain Buzard before he agreed to accept the transfer of the Mosty contract that I knew the contract would be filled, because R. E. McAnulty was a partner with Mosty in this

contract, because R. E. McAnulty had told me he was a partner with Mosty in this contract. (Second question and answer on p. 89, Trans.)

"When Captain Buzard came to see me at Gonzales, he demanded that I should pay back to him the fifteen thousand dollars he had paid me. (Bottom p. 89 and top p. 90, Trans.)

"Buzard did not refuse to accept an assignment of the Mosty contract unless I would guarantee the fulfillment of it; but accepted it, and said he would accept it if I would give him the interest on the fifteen thousand dollars that Mosty would owe. I told him I would be busy receiving and branding cattle about that time in Gonzales county, and it would suit me to get him to take this contract, and that I would deduct twenty-five cents per head on the previous contract, if that suited him; if not, I would go on with the first contract; and he said if I would give him the interest he would do it. It would have cost me about this amount to have gone and received the cattle, but I did not so tell Buzard that I remember of. I did not tell Buzard that I could not well attend to the completion of the contract by Mosty, and that it would be a useless thing for me to attend to the delivery of the cattle by Mosty, and then hand them immediately over to Buzard and Hillard. (Answer to first question, p. 90, Trans.)

"Buzard did not say at the time he accepted this transfer that he knew nothing of the solvency of Mosty, and would accept my word for it. No such conversation passed between Buzard and myself that he would take my word that McAnulty was a partner with Mosty in the contract, and it could not have happened, because I never told Buzard McAnulty was a partner with Mosty in the

contract. I told him that Mosty had told me he was a partner with McAnulty in the cattle business, but I did not tell him that Mosty had said he was a partner in this contract. Buzard did not tell me that he would take an assignment of this contract to accommodate me and save me the trouble of going up there to receive the cattle." (Answer to question, bottom p. 90, Trans.)

Mr. Dilworth, one of the defendant's witnesses, in his testimony shows that when defendant left home for San Antonio on October 31, 1881, he had made up his mind to dispose of the Mosty contract without recourse on himself, and in this particular flatly contradicts Mr. Houston. The witness said: "I gave Houston advice how to transfer the Mosty contract. I advised him to transfer it without recourse, and he remarked that he did not know how it ought to be done. I told him to get a lawyer to draw up the transfer." (P. 81 Trans.)

On cross examination he says: "I first spoke of the transfer of the contract; he told me he had sold the contract, and was coming up to San Antonio to close the trade, and I then suggested the method how it should be done; *he told me he had sold or was about to sell the contract, and not the cattle.* I don't remember the date of this conversation; he was then preparing to come up to close the trade; he had left his home and was then on his way up." (P. 82 Trans.)

Mr. Dilworth is and was the banker of Mr. Houston, and his confidential friend.

That Mr. Houston after arriving in San Antonio on the evening of October 31, 1881, and before he saw Captain Buzard, had two talks about trading these same cattle, is clear from the testimony of Messrs. Millett and Gamel, witnesses for complainants.

Mr. Millett testified: "I saw him (Houston) about the middle of October, 1881, during fair week at San Antonio, at the Hord hotel. Houston asked me if I was buying cattle, and I told him I was. He then told me he had some cows to sell. I asked him where they were. He told me one lot of about fifteen hundred was about Lampasas, and that he had about one thousand in Gonzales. I then asked him who was to deliver the cattle at Lampasas. He told me Lee Mosty. I then remarked that that trade wouldn't be filled, and we wouldn't talk trade about that lot, and those at Gonzales we could not agree about the time of delivery." (P. 61 Trans.)

Mr. Gamel testified: "During the fair at San Antonio in 1881, I had a talk with R. A. Houston about some cows, about one thousand head; they were in Lampasas county. I don't know who was to deliver them. The conversation was simply this: I wanted the cows, and he didn't want me to have them. The reason why he didn't want me to have them was that he said they were not good enough, or something that way, and that he would rather put them off on *this other party*. I don't remember that Houston said there was any doubt about the delivery of the cattle. He simply said I was a friend of his, and he did not want me beat, or something like that. He did not claim to have the cattle then, and only claimed to have a contract for them." (P. 67 and 68 Trans.)

That such representations were made is fully supported by the preponderance of the testimony, and that these representations were the inducements which caused the action of Buzard in the acceptance of the transfer of the Mosty contract in lieu of the original or memorandum contract between him and Houston cannot be doubted, for he is uncontradicted in his testimouy wherein he states:

"The reason why I accepted the contract from Houston in the way I did was because I considered the representations he had made regarding Mosty's and McAnulty's solvency and financial standing were true, and because I believed his statements that McAnulty was a partner in the contract was true. I considered Mr. Houston as reliable, and relied on his statement of the facts in regard to the matter, and also on the statements of Major D. W. Hinkle. If these representations had not have been made by Houston, I would not have accepted the assignment of the contract." (Trans., p. 49, bottom.)

That these representations were all false cannot be doubted. Houston in his answer admits the insoluency of Mosty at the time of the transfer of the contract. The proof contained in McAnulty's evidence is satisfying that he was neither a partner of Mosty in this contract nor had he any interest in it whatever. (Trans., p. 76.)

To the second direct interrogatory the witness answers: "I don't know anything of my own knowledge about the contract; have heard Houston say that he made a contract with L. A. Mosty, and have heard Mosty say that he made a contract with Houston concerning cattle; don't know the date of the contract between Houston and Mosty; have heard that it was made in August, 1881. I don't know its terms and conditions, only from what I have heard Mosty and Houston say about it. *I never had any connection with or interest in said contract whatever.*"

Again he says, in answer to the third direct interrogatory, "I have stated that I know nothing of my own knowledge of the terms and conditions of said contract, and that I never had any connection with or interest in said contract; I had no connection, interest or responsi-

bility with or in said contract. *There was no partnership relation existing between Mosty and myself at the time said contract was made.*" (2d par. p. 76, Trans.)

If these representations were made as facts—not mere opinions—and were all, or the controlling ones, untrue, and were believed by Buzard, and his action was controlled by them, then Houston should be compelled to place Buzard and his associate back in the situation they occupied before the change was induced to their injury.

Houston claims that he believed all these representations to be true when they were expressed by him as opinions only. If he merely expressed opinions, as opinions, not as facts, it would not matter whether true or false, honest or dishonest, or even mendacious and crafty. If, however, as the proof seems to substantiate. he made such untrue representations as existing facts, and they induced the complainants to change their relations to their injury, then they are entitled to relief, whether he knew them to be false or was ignorant of their truth or falsity; for whenever any party, by his acts or words, causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition. In illustration of the principle I contended for, the following cases are all pointed authorities:

*Wintz vs. Morrison, 17 Texas, 372 and 383.*
*Haldeman vs. Chambers, 19 Texas, 2.*
*Smith vs. Richards, 13 Peters. 26.*
*Willard vs. Taylor, 8 Wal., 557.*
*Slaughters Admr. vs. Cerson, 13 Wal., 379.*
*Chouteau et al. vs. Goddin et al., 39 Mo., 250.*
*Taylor vs. Zepp, 14 Mo., 482.*

*Newman vs. Hook, 37 Mo., 207.*
*Buford vs. Caldwell, 3 Mo., 477.*
*Bennett vs. Judson, 21 N. Y., 238.*
*Mitchell vs. Zimmerman, 4 Texas, 75.*
*Boukhead vs. Alloway, 6 Coldw. Tenn., 56.*
*Pomeroy Eq. Jurizp., sec. 887 to 891 and authorties.*

In the case of Smith vs. Richards the Court, after citing several cases and quoting from some, concludes: "The principles of these cases we consider founded in sound morals and law. They rest upon the ground that the party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and, in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. 6 Ves., 180, 189; Jeremy, 385, 386. The purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it, and, as was well argued in the case in Cranch, it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller."

Thus fully I have quoted from the testimony in the record and decisions to present the views I entertain to the Court, and I submit that the equities in this cause are with complainants, and they are entitled to the remedy sought.

I have appended a full and carefully prepared abstract of all the testimony in this case for the convenience of the Court.

I think complainants are entitled to have the contract of assignment set aside and cancelled, and the $15,000 advanced upon the same, together with interest, refunded to them; and to a cancellation of the obligation for $1837.50 also; for the reason that the hereintofore invoked principles are decisive of the cause in complainants' favor.

It is not reasonable to suppose that Buzard could have been so insane as to have accepted the transfer of the Mosty contract in lieu of a valid contract with a solvent and responsible man, as Houston was by him known to be, unless he had implicitly relied upon Houston's representations that Mosty was as good or better than he was; that Mosty was solvent, and that McAnulty, whom Buzard knew to be solvent and responsible, was a partner of Mosty in the contract to be assigned.

Had the truth been known, can it for one instant be supposed that this trade, or the substitution of the one for the other, would have been made? Houston's statements, as shown by the testimony of his agent, Hinkle, outside of Buzard's testimony, are sufficient to satisfy the conscience that Houston and Hinkle both knew that Mosty was insolvent at the time. Hinkle says he did not believe Mosty was good, and Houston was as much bound by the knowledge or belief of his agent as he would have been by his own knowledge or belief. This contract of substitution was unequitable, and had all the knowledge and belief within the minds of Houston and his agent, Hinkle, been communicated to Buzard, it would never have been agreed to by him, and the agreement should be rescinded and the first contract declared in force.

"An opinion stated to the other party as a fact material to the transaction—not as an opinion entertained by him

—if false, is a misrepresentation, and if the other be induced to act upon it to his prejudice, equity will grant relief."

*Haygarth vs. Wearing*, *L. R. 12 Eq.*, *320*,*327*,*328*.

That the representations made by Houston to Buzard were made for the purpose and with the design of procuring Buzard's consent, which had been previously declined, to the substitution of the one contract for the other, of inducing him to enter into the last contract as a substitute for the first, is apparent from all the evidence of both parties. If, therefore, the representations were made as facts, that Mosty was good and solvent and better than Houston; and that the cattle were twelve hundred of them then on hand and in the rail brand of said Mosty on his ranch in Lampasas county; and that R. E. McAnulty was Mosty's partner in this contract, and these representations were made prior to the consent of Buzard to accept a transfer of the Mosty contract in lieu of the contract he then had with Houston; and after Buzard had agreed to accept the assignment of the contract if guaranteed by Houston, and these representations were made directly relating to the inducement to obtain Buzard's consent to the transfer of said Mosty contract without recourse upon Houston, in lieu of the contract he then held with Houston, and were of such a character as would naturally and reasonably induce, or tend to induce, any ordinary person to act upon them, and consent to the substitution of the one for the other, and that these representations were followed by the consent of Buzard to accept the transfer of the Mosty contract without recourse on Houston, in lieu of Houston's fulfillment of the first contract, then it will be presumed that these representations were made by Houston for the purpose and with the

design of inducing Buzard to substitute the Mosty contract for the one with Houston, provided these representations were untrue in point of fact.

*Pomeroy Eq. Jurisp., Sec. 880 and authorities in note.*

The same result would follow this state of case whether Houston was guilty of *moral* culpability or not, whether he believed them to be true when he made them or knew them to be untrue.

*Pomeroy Eq. Jurisp., Sec. 885 and authorities in note.*

If Houston, at the time he made the false representations, had no knowledge of their truth, he is chargeable with fraud, although he had no absolute knowledge of their untruth, and may claim to have had a belief in their truth, and his claims to have believed in the truth of his statements, which were in fact false, cannot be regarded as at all material.

*Pomeroy Eq. Jurisp., Sec. 887 and authorities in note.*

The fact that the inducement included in the reduction of twenty-five cents per head was declined by Buzard, and that he refused to take the assignment of the Mosty contract, when taken together, show that the false representations induced his action alone. The Court will see by the testimony that all the money consideration had been offered and declined by Buzard. It is not contended that Buzard ever consented to accept the assignment without recourse, or at all, until the meeting of the parties at Hinkle's office on the morning of November 1, 1881, but the reduction in price had been offered on the night previous, and on the following morning Buzard declined

to accept the assignment of the Mosty contract, unless Houston would guarantee its fulfillment. It was then Houston, for the first time, represented that McAnulty was a partner, and that there were twelve hundred head of the cattle on hand, and it was then that Major Hinkle, Houston's acknowledged and paid agent, corroborated these statements, and by their combined and confederated action, induced Buzard to surrender the good contract for a worthless one. (Trans., p. 50.)

Houston knew Mosty. Had made the contract with him. Had advanced him $15,000 as part payment for the cattle Houston was to receive under it. He had known Mosty for years before. He had advanced this money to him and paid Mosty's draft upon him months before. Buzard knew nothing of Mosty. Had never heard of him. Mosty lived a long distance from San Antonio, where the transaction took place, and was unknown there. Their opportunities were uneven. The facts stated by Houston were such as any reasonable man might rely upon. His knowledge of Mosty's responsibility should have been extensive. He was upon trading terms with Mosty, and had reposed confidence in him to the extent of advancing him $15,000 without security.

This was the general manner of trading in cattle in Texas.

It is essential, of course, that Buzard should have trusted the representations of Houston, and that he was so thoroughly induced by his false representations that, judging from the ordinary experience of mankind, in the absence of these false representations he would not, in all reasonable probability, have entered into the transaction of accepting the transfer of the Mosty contract without any recourse upon Houston in lieu and stead of his con-

tract with Houston. which was good, beyond doubt, and which Houston swears himself would have been by him faithfully fulfilled.

The evidence is positive that Buzard did rely *most implicitly* upon these representations of Houston. That they were all false in fact. That Houston knew that the one that McAnulty was a partner of Mosty in this contract, because McAnulty had told him so, was knowingly and wilfully false. He does not himself claim it true. He denies making the statement that McAnulty told him so, but admits that he represented the fact, and that he knew it because Mosty had told him so. McAnulty is known to have been solvent, and as good and responsible as Houston himself.

It is not unreasonable that, from the ordinary experience of mankind, Buzard should, believing these representations to be all true, have relied upon them and have acted just as he did. The contracts were of the same nature, and refusal to perform by one would have been as disastrous as refusal by the other, if both were primarily responsible. Can it seem possible that any rational man could have changed his condition, as Buzard did in this case, unless he had been induced to do so solely by these false representations, relying on their absolute truth.

It may and will be urged that other considerations were offered, which induced Buzard to change his condition, but this will not control unless the other inducements and considerations were sufficient to induce Buzard to make the change alone. If these other inducements and considerations would have been declined had they been unaccompanied by the false representations, then these repsesentations were the moving inducements, and, being

relied upon, if any one was false, the Court has no means of determining that this false one did not turn the scale and itself induce Buzard to change his condition.

*Pomeroy's Jurisp., Sec.* 890, *and authorities in note.*

The representations made by Houston were concerning things really material. They really form a part of the transaction and are essentially connected with its substance.

From the nature of the transaction and the situation of the parties it may be assumed that these facts represented by Houston were within his knowledge or within his power to have known them. He was in correspondence with Mosty and had business with him, and Buzard knew nothing of him, and had a right to rely upon Houston's representations as being true, and to act upon them as true.

*Pomeroy Eq. Jurisp., Sec.* 801 *and authorities in note.*

*Slaughter's Admr. vs. Gerson*, 13 *Wal.*, 379.

When Houston made these representations concerning material facts, he must have had knowledge of the solvency or insolvency of Mosty, or from his connection with him he must be supposed to have had such knowledge; whereas Buzard knew nothing about Mosty, and had never been in a position where he was supposed to have any knowledge of him, and was not at that time aware that he knew any one who did know Mosty, from whom he could make inquiry concerning his (Mosty's) solvency. Buzard did not even know his post office address, and he had a right to rely upon Houston's representations.

The contract made August 13th, 1881, between Mosty and Houston, provided for the sale and delivery, between the 1st and 15th of next May, *i.e.*, 1882, of 1500 head

of cows and bulls for a certain price per head, at some point in Lampasas county, Texas, within six miles of the town of Lampasas.

The memorandum contract between Houston and Buzard provided for the sale and delivery of the same cows and bulls (as the testimony of Houston shows) for a certain price per head, at the town of Lampasas, in Lampasas county, Texas.

Houston held this contract with Mosty, and Buzard held his for himself and the other complainant, Hillard, with Houston.

This is the position in which we find the parties when they meet at San Antonio on October 31, 1881.

They meet casually, neither expecting the other, for this meeting was ten or twelve days before they were expecting to meet to formulate the memorandum contract into a formal one, between Houston and Buzard and Hillard.

At this time of their meeting Buzard had never heard of Mosty, nor of any contract between him and Houston. Houston had then held this contract with Mosty over two and a half months. Houston and his agent both knew at that time that Mosty had failed to fulfil a similar contract to this one, which he had made with G. W. Littlefield, a neighbor of Houston. Houston had, before leaving his home at Gonzales, determined to sell the Mosty contract without recourse upon himself, and had taken advice from his banker at Gonzales as to the manner of making such a transfer of the Mosty contract, so states Mr. Dilworth, the banker, friend of and witness for Houston in this cause. Houston denies that he had any such intention, or conversation with Dilworth.

It is admitted in defendant's answer that Mosty had been utterly insolvent for over three weeks before that time, since October 7, 1881. Houston himself testifies that the cows and bulls which Mosty had, on August 13, 1881, contracted to sell and deliver him, were the identical cattle which he had, on the 14th day of October, 1881, contracted to sell and deliver to Buzard.

If Houston knew nothing of Mosty's insolvency on October 31, when he left Gonzales for San Antonio, why did he state to Dilworth that he was going to San Antonio and should attempt while there to sell the Mosty contract without recourse upon himself; when, in fact, he had already contracted to sell the same cattle to Buzard two weeks before the date of this trip to San Antonio. Why did he, after arriving, try to sell this Mosty contract to Mr. Dewees, and why to Mr. Millett, and why refuse to sell these cattle to Mr. Gamel, because as Houston stated to Gamel that he was a friend of Gamel, and these cattle would not be delivered, and he (Houston) did not want him (Gamel) to hold the contract; he preferred putting it off on this other party.

The testimony shows that nothing was said about transferring the Mosty contract to Buzard, without recourse upon Houston, until the last meeting of Houston, his agent Hinkle and Buzard at Hinkle's office in San Antonio, on the morning of November 1, 1881, when Buzard agreed to substitute the Mosty contract with Houston in the place and stead of the Houston contract with Buzard, provided Houston would guarantee the fulfillment of the Mosty contract.

It was at this time, only a few minutes before the transfer was made, that all these representations were made by Houston, and repeated and confirmed by Hinkle, in

whose veracity Buzard reposed great faith, that Buzard accepted the transfer of the Mosty contract in lieu of Houston's contract with him, and delivered Houston's with him up to Houston. Can it be presumed that Buzard, or any other sane man, for the reduction of twenty-five cents per head on said cattle, would have surrendered an advantageous contract with a person by him known to be responsible, solvent and amply able to fulfil it, with a penalty of four times the reduction provided for therein, if that party should fail or refuse to fulfil it; and accept the assignment of one upon a party living far away concerning whom he knew nothing, unless he believed and relied upon the statements and representations of Houston and his agent Hinkle, made in Houston's presence, and undenied by Houston.

It is apparent that he did believe these representations and implicitly relied upon them, and accepted the transfer of the Mosty contract to oblige Houston, and partially to save him the useless ceremony of being upon the ground at the date of delivery in May, 1882, near Lampasas, Texas, to receive them from Mosty, and then immediately to turn the same cattle over to Buzard.

This is fully borne out by the testimony of both Buzard and Hinkle, given in this cause. Taking all the circumstances of this case, with the positive testimony of Buzard and Hinkle, the denials and testimony of Houston, must be considered and treated as untrue.

From the time the proposition was made by Houston to Buzard to accept the transfer of the Mosty contract without recourse on him at Hinkle's office, the parties never separated, and no time was given to inquire about Mosty's solvency. It was an unequitable and unconscientious advantage taken by Houston and his agent,

Hinkle, of Buzard, by inducing him to rely upon false representations made to him by persons in whom he reposed confidence. The matters concerning which the false representations were made were not at hand, and no inquiry which Buzard could have made by any methods within his knowledge and power would have revealed their falsity. Relying upon the truth of these representations, and the good faith of Houston and his agent, Hinkle, he was induced to exchange a good and valuable contract for one utterly worthless and so known to be (it may be fairly assumed) by Houston, and to part with $15,000 of his and his partner's money.

Buzard was given no time or opportunity to examine into the real facts, neither was his attention ever directed by Houston or any one else to the sources of information, nor to any channel through which the truth or falsity of the representations could have been obtained, although the sources and channels were well known to Houston, who had but recently been in communication with Mosty. Although he knew Mosty well, knew his address and knew his friends, yet he vouchsafed not one word to Buzard.

The transaction was completed; the transfer was made; the money paid by time draft at 16 days from date; the draft discounted by Houston the next day; and thus the matter rested for ten days, when, through a friend, neither Hinkle nor his agent, Buzard learned that it was currently reported at Austin, Texas, that Mosty had failed—was worthless. Buzard hurried to Lampasas county, a long distance, to see him, but he had fled, and Buzard learned that he was not only worthless then, but had been for over thirty days.

Then he went directly to Gonzales, the home of Houston, and reported to him the true state of the matter, and

demanded a rescission of this transaction, on the 17th day of November, 1881, sixteen days after its consummation.

Buzard and his partner, immediately thereafter, as soon as their attorneys could prepare their bill, brought this bill, on the 23d day of November, 1881, nearly six months before the contract of Buzard with Houston was to have been fulfilled by its terms, to rescind and cancel this contract between Houston and them of transferring the Mosty contract, and to re-establish the contract between Houston and Buzard, originally made.

If it be deemed by the Court impractical to reinstate the memorandum contract, because its period for fulfillment has long passed, then I ask that the Court decree a return to complainants by defendant of the $15,000 paid by them to him, and interest upon same from November 1, 1881, and also the $1,500 damages contracted to be paid by Houston in the event he should not fulfil the said memorandum contract, and interest on that from May 15, 1882, a concellation of the 1,837.50 obligation, and for such other and further relief as complainants may be entitled to under the circumstances of this cause.

I submit this cause, praying for proper decrees and orders.

H. E. BARNARD,
*Solicitor for Complainants.*

## Abstract of the Testimony of Appellant.

Benjamin F. Buzard, the witness for the appellant, testified: I am forty-two years old; reside at St. Joseph, Missouri; Moses Hillard, a resident of St. Louis, Missouri, and myself are the plaintiffs in this case; we are in the ranching and stock business on the Nueces river in Zavalla county, Texas; the Pedro Jose Aguerre and Antonio Aguerre tracts, containing about eighty-one thousand acres, is our ranch; we began in the business when we purchased the first land in July, 1881; our object in purchasing the land was to establish a ranch to raise cattle; we began our purchase of cattle in 1881, we were purchasing principally she cattle—cows. (The defendant's counsel here objected to the witness giving any testimony in the matter in dispute between the parties, on the ground that it is illegal and improper, and that he is incompetent to testify.) I made a contract with R. A. Houston in October, 1881, for fifteen hnndred head of cows. (The defendant here objected to all parol evidence of the contract, because the contract is on file in this cause, and is in writing, and speaks for itself, and is dated October 14, 1881, and for the further reason that the pleadings of both parties show the contract to be in writing, and of the date of October 14, 1881.)

A paper was here shown the witness marked Exhibit "A" to defendant's further answer, and filed on August 4, 1882, by W. C. Robards, clerk, per D. Beall, deputy, and the witness, after examining the same, said:

This is the memorandum contract made between Mr. Houston and myself for fifteen hundred cows and some bulls. I made this contract in behalf of Buzard and Hillard, the plaintiffs in this suit. The contract is in the handwriting of Major D. W. Hinkte; he drew the contract. The cows mentioned in the contract were wanted for the purpose of putting them on the ranch for breeding purposes.

The defendant knew the purposes for which they were wanted.

The circumstances under which the contract was made were as follows: Mr. Hinkle stated to me that he had a party who had a large lot of cows and cattle for sale, such as I wanted, and brought Mr. Houston and introduced him to me, and then we talked over the trade, and I asked him about the quantity of cattle and price, and made this agreement, that he would sell me fifteen hundred head of cows and some bulls that were in the lot—I don't know that the number was mentioned at that time—for fifteen dollars and fifty cents per head, to be delivered on or about the 1st of May, 1882, at or near Lampasas, Texas.

The following is a copy of the contract we entered into:

San Antonio, Texas, October 14, 1881.

Received this day of B. F. Buzard five hundred dollars in part payment for fifteen hundred head of cattle, cows and bulls, to be contracted for next Tuesday, on which Mr. Buzard agrees to advance fifty per cent. of the price, which is to be fifteen dollars and fifty cents per head.

R. A. Houston agrees to make the contract at the time specified, cattle to be delivered at Lampasas, Texas, between the 1st and 10th of May, 1882. If the cattle are not delivered, R. A. Houston agrees to forfeit to B. F. Buzard fifteen hundred dollars if the con-

tract is not filled. B. F. Buzard binds himself to take two thousand cows at the same figures, and to forfeit fifteen hundred dollars if he fails to comply with the contract.

R. A. Houston.
B. F. Buzard.

Witness:
D. W. Hinkle.
J. H. Presnall.

The cattle were to be between the ages of three and eight years old, on which I was to pay in advance fifty per cent. when this contract was completed, and the balance when the cattle were delivered. We agreed at that time—it was very late at night—to have a memorandum contract made, and meet in San Antonio a few days later, I think three or four days later, and complete the contract, at which time I was to pay over the advance on the cattle. I don't remember the date we were to meet; my impression is it was about the 17th of October. There was a particular day set for us to meet. We then had Major Hinkle draw the contract before referred to, and we signed it and had it witnessed, and placed it in Major Hinkle's hands for him to hold until the day appointed for us to finish the contract. At the time the memorandum contract was made I paid him (Houston) five hundred dollars on the contract. On the day appointed for us to meet, which was at Major Hinkle's office iu San Antonio, I was at the place appointed ready to complete my contract. Mr. Houston did not come, but sent a man named Walker, whose initials I do not remember, to inform me that Mr. Houston was sick and unable to meet me at that time. Mr. Walker stated that Mr. Houston would agree to meet me at any time that Walker and myself might arrange, to finish the contract. We agreed, as I was going to leave town the following day, to be absent several weeks, that on my return I should notify him (Houston) by telegraph, and he would come to San An-

tonio to meet me. On my return to San Antonio, on the 31st of October, 1881, I met Mr. Houston, and after talking over the matter of our contract on that evening, he agreed to meet me next morning at Major Hinkle's office and complete the contract. After some further talk about the matter on the same evening of October the 31st, Mr. Houston proposed that, instead of completing the contract as we had agreed upon—

(The defendant here objected to the witness giving any testimony of the assignment and transfer to him of the L. A. Mosty contract, because the pleadings of both parties show that the said Mosty contract, as well as the assignment and transfer of it to the complainants are in writing; and for the further reason that the witness, being complainant, is not competent to testify on the subject, and because it is an attempt to vary by parol evidence a written agreement between the parties.)

The witness then continued as follows: To transfer a contract between him (Houston) and Mosty for about the same number of cattle—about fifteen hundred head of cows and fifty bulls. He stated that they were the same cattle he had sold me, and that at the time he would have those cattle to deliver he would be very busy putting up cattle in another part of the state, and that it would be almost impossible for him to be there at that time. That he would have to receive the cattle from Mr. Mosty and then immediately turn them over to me, and that I could just as well receive them from Mosty as he could. He then handed me the contract between him and Mosty, and, after reading the contract over, I answered that I would see about it in the morning. We had some further talk about the matter that evening and then separated, and met next morning, November 1st. On the evening

of October the 31st he stated that the contract was good; that Mr. Mosty was a large dealer in cattle and fully able to fill the contract.

The following is a copy of the contract between Mosty and Houston:

DODGE CITY, FORD COUNTY, KANSAS, Aug. 13, 1881.

Contract entered into this day at Dodge City, Kansas, by and between L. A. Mosty, party of the first part, and R. A. Houston, party of the second part, to wit: That L. A. Mosty, party of the first part, hereby agrees to sell and deliver unto R. A. Houston, party of the second part, fifteen hundred dry cows, at fourteen dollars per head; same to be good, smooth and merchantable cows, and to range from three (3) to eight (8) years old. And furthermore L. A. Mosty, party of the first part, agrees to brand said cows with the road brand of R. A. Houston, party of the second part, and to deliver said cows at a point six miles west of Lampasas, Texas; also, L. A. Mosty agrees to deliver and sell to R. A. Houston fifty (50) bulls at fourteen dollars ($14) each, said bulls to be from three (3) to five (5) years old, straight and smooth. L. A. Mosty, party of the first part, hereby acknowledges the receipt of fifteen hundred ($1500) dollars from R. A. Houston, party of the second part, as part payment on herein mentioned cattle.

Furthermore, R. A. Houston, party of the second part, hereby agrees to honor the drafts which may be drawn by L. A. Mosty, party of the first part, to the amount of thirteen thousand five hundred ($13,500) dollars, interest to be computed at the rate of ten per cent. per annum. L. A. Mosty, party of the first part, hereby agrees to deliver said cattle between the 1st and 15th days of May, 1882.

It is further agreed that the balance due on said cattle shall be paid upon their delivery.

In case of failure of L. A. Mosty, party of the first part, to comply with the above conditions and agreement between him and R. A. Houston, L. A. Mosty hereby agrees to forfeit the sum of fifteen hundred ($1500) dollars, same to be paid over to R. A. Houston, party of the second part.

L. A. MOSTY.
R. A. HOUSTON.

WITNESS:
J. W. ORMOND.
R. M. WRIGHT.

The witness proceeded as follows: On the morning of November 1, we met in Major Hinkle's office, when Mr. Houston again urged the transfer of the Mosty contract, and that it would be impossible for him to be in Lampasas at the time to receive and deliver the cattle, and that if I would take that contract instead of completing the contract as he had agreed, and pay him fifteen thousand dollars that he had advanced to Mosty on the contract, he would let me have the cattle at fifteen dollars and twenty-five cents per head, and me pay the difference between his contract with Mosty and fifteen dollars and a quarter, which would be one dollar and twenty-five cents per head; that he would be satisfied with making that profit on the contract by not having to go and handle the cattle. Houston gave as a reason for wishing to change the contract that he was handling so many cattle, and was so busily engaged all the time, that it would be almost impossible for him to go and receive these cattle. He also stated that it would be an expense of going there to receive the cattle, and the loss of the time to him would be about as much as twenty-five cents per head.

When Houston made this proposition, on the morning of November 1, I objected to taking the assignment of the Mosty contract, for the reason that I did not know Mosty or his financial standing. Houston assured me that Mosty was good and solvent, and able to fill the contract, and that R. E. McAnulty was the partner of Mosty, and that he was also good. He said that McAnulty was Mosty's partner in this contract.

Houston stated that Mosty was good and handled more cattle than he (Houston) did, and more able to fill his contracts than he was. I was satisfied that McAnulty was solvent. I knew of his solvency. I then stated to Houston I would take that contract if he would guarantee the

fulfilment of it; he said he would not guarantee that or any other man's contract, and again asserted that Mosty was good and McAnulty also, and asked Major Hinkle if such was not the fact. I asked Major Hinkle what he knew about the parties. He said he considered Mosty good, and that R. E. McAnulty was as good financially as any cattle man in the State, and that if R. E.McAnulty was Mosty's partner in that contract he didn't think a better contract could be made.

Houston stated then that he knew McAnulty was a partner, as McAnulty had told him so, and there would be no question about the fulfilment of the contract, and he again repeated that his only reason for wanting to assign that contract instead of completing the other was his inability to go and receive the stock, that he knew that Mosty had most of the cattle then on the range; that about twelve hundred of the cows were Mosty's own ranch cows with Mosty's rail brand on them; that the balance of the cows were already bought by Mosty, or would be bought by him in Lampasas county and all would be ready to be delivered on or about the 1st of May, 1882. I then said to Mr. Houston that I did not know whether Mosty was good or not, but that I knew he, Houston, was good, and that if the represeutations were as he made them, I would take his word for it and take the assignment of the Mosty contract instead of the contract we had agreed on; that I would pay him then, at that time, the fifteen thousand dollars he had advanced on the contract, and would give him our obligation for the dollar and a quarter per head to be paid when the cattle were delivered, and pay the balance due on the cattle at the same time; which was agreed to by Mr. Houston. Major Hinkle then took the memorandum

contract from the desk and handed it to Houston with the remark, "I do not think you gentlemen have any further use for this."

Mr. Houston took the papers—the momorandum contract and other papers—and put them in his pocket. We then went to the office of Mr. Felix Smith, I think, who wrote the assignment on the contract.

The following paper was handed to the witness:

STATE OF TEXAS, }
COUNTY OF BEXAR. }

Know all men by these presents that I, Robert A. Houston, party of the second part to the above and foregoing contract, for and in consideration of the sum of fifteen thousand dollars, to me in hand paid by Buzard and Hillard, (being the sum advanced by myself, R. A. Houston, in payment on the said contract,) and the further sum of $1,837.50 (eighteen hundred and thirty-seven dollars and fifty cents), due upon completion of the foregoing contract, do this day transfer unto said Buzard and Hillard all the right, title and interest which I have by virtue of the said foregoing contract, it being understood that no responsibility shall rest upon me in the event that L. A. Mosty, party of the first part in said contract, fails to comply in any respect with the terms thereof.

In witness hereof, I hereunto sign my name, this 1st day of November, A. D. 1881.

R. A. HOUSTON.

WITNESSED BY
F. G. SMITH.
J. F. LACOSTE.

And he proceeded to testify as follows: This is the Mosty contract, and the assignment thereon to which I have referred in my testimony, and is the same that was delivered to me by Mr. Houston at that time.

The two following papers were handed witness:

DENISON, TEXAS, AUGUST 19, 1881.

Received of R. A. Houston five thousand dollars (5,000) on contract August 13, 1881

L. A. MOSTY.

DALLAS, TEXAS, September 28, 1881.

ROBERT A. HOUSTON, ESQ.,
Gonzales, Texas,

DEAR SIR:—I have this day drawn on you through Ball, Hutchings & Co., for eighty-five hundred dollars, same to apply on our contract for cattle to be delivered. Hope this may not inconvenience you in any way.

Respectfully,

LAMPASAS Texas. L. A. MOSTY.

These papers were delivered to me by Mr. Houston at the same time he assigned the Mosty contract to me, and were given to me in order to show that he had paid Mosty the fifteen thousand dollars on the contract. When the assignment was made, I gave Mr. Houston a draft payable at the bank of Thornton & Lockwood, payable sixteen days after date, I think, for fourteen thousand five hundred dollars. On the night before, in talking over the matter of the contract with Mr. Houston, I said that so long a time had elapsed since we were to close the contract that I had used the money intended for him in the purchase of other cattle, and that I would give him a time draft to enable my partner, Captain Hillard, to place funds to my credit, which would be done in a few days. He said he would accept it in that way, and it made no difference to him; that he did not need the money then. I gave him the draft in that way, due sixteen days after date, for fourteen thousand five hundred dollars, which, with the five hundred dollars previously paid him, made fifteen thousand dollars, and I gave him our obligation for the dollar and a quarter a head, payable when the cattle under the Mosty contract were delivered. Mr. Houston discounted the draft at Thornton & Lockwood's the following day. The reason why I accepted the contract from Houston in the way I did was because I considered the representations he had made regarding Mosty's and McAnulty's solvency and financial standing were true,

and because I believed his statement that McAnulty was a partner in the contract was true. I considered Mr. Houston as reliable, and relied on his statement of the facts in regard to the matter, and also on the statements of Major D. W. Hinkle. If these representations had not been made by Houston I would not have accepted the assignment of the contract.

After this transaction was completed I went to the ranch in Zavalla county, and on the 9th or 10th of November I received a telegram from San Anionio, sent by W. S. Carothers, notifying me that Mosty was reported broke. In answer to his telegram I came to San Antonio, and upon inquiry found that it was generally reported that Mr. Mosty had failed. I went at once to Austin, and after consulting my attorney, Mr. Green, I went to Lampasas, the home of Mr. Mosty. I here found, upon investigation, that Mr. Mosty was insolvent and had transferred all of the property out of his hands early in October. I could find no evidence that Mr. McAnulty was a partner of his in this contract. The transfer of the property had been made by Mosty to R. A. McAnulty, and the property was then partly in the possession of McAnulty and partly in the possession of George W. Littlefield. I found there was no property I could get, and that there was no way of getting any money from Mosty; that his transfer of property had been made some time before the assignment of that contract to us, so I returned and went to Gonzales and saw Mr. Houston. I stated to him what I knew in reference to Mosty's insolvency, and asked him to either fill the contract or return us the money paid him. He refused to do either. I started the same day that I received notice of Mosty's insolvency, which was about the 9th or 10th of November, and got to Lampasas about three days later, which was about the 13th. I returned

at once from Lampasas and reached Gonzales about two days later, about the 16th or 17th of November, 1881. McAnulty lived, I think, in or near Belleville, Austin County, Texas, at the time the assignment of the Mosty contract was made; he was a cattle dealer; and Mosty's place of residence was near Lampasas, Lampasas county, at that time.

CROSS-EXAMINATION.

I visited Texas first in 1877; I was then living in Missouri. I was engaged in the printing business principally. I was so engaged previous to 1877, and am yet. While living in Missouri I have paid attention to the cattle business. I have had a ranch in Kansas and the Indian Territory for the last eight years. During the last eight years I have frequently been in Fort Dodge and Caldwell, Kansas, and Cheyenne, in the Wyoming Territory, and to all the principal places where the Texas cattle men make their drives. I have met a great many Texas cattle men at these places, and have seen their cattle. I have had cattle dealings within the State of Texas during those eight years.

Previous to 1881 my cattle dealings in Texas extended to the northern part of the state, in Jack, Tarrant, Fannin, Hunt, Kaufman and Hopkins counties. I have partners in my land purchase in Zavalla county, Texas. They are Moses Hillard and Joseph S. Nanson. They are also interested with me in the cattle business I am carrying on there. There are no other persons interested in this cattle business, unless you would consider Mr. Barnard interested, who is acting for his father-in-law, Captain Nanson. We have all equal interests in the business. Mr. Barnard has no individual interest in the business other than that represented by Captain Nanson.

The first forty thousand acres of the land was purchased in 1881 by Mr. Hillard, Mr. Barnard and myself; the balance was subsequently purchased by Captain Hillard, Mr. Nanson and myself.

I am a citizen of Missouri; my family resides there; Mr. Hillard and Mr. Nanson are also citizens of Missouri. Mr. Barnard resides in Texas, and I presume, under the law, he would be a citizen of this State. He resides here with his family, and is practicing law. When I met Mr. Houston in San Antonio on the 31st of October, it was accidental and not pre-arranged. At that time we had no conversation about anything except the cattle trade with the usual compliments. He regretted his inability to meet me at the previously appointed time, and Mr. Houston said, "As we are both here now, we can go on and fix the matter up." It had been arranged between Mr. Walker and myself that when I returned to San Antonio, I would telegraph to Mr. Houston, but when I left San Antonio I did not expect to return before the 10th or 15th of November, the time spoken of by Walker and myself when I should meet Mr. Houston was about the 10th or 15th of November. I had not telegraphed my return to Mr. Houston prior to meeting him. In the course of our conversation, when we met, Mr. Houston asked me "Why can't you take this contract I have made with Mosty, and save me the trouble of going up there; they are the same cattle I previously sold to you?"

He did not say to me that he would make me another proposition, or a new proposition, he said he would like me to take this contract off his hands, and save him the trouble of going for the cattle.

He showed me the Mosty contract that evening, and I read it and returned it to him. After reading the con-

tract that evening, I did not say that I would accept the asignment of it provided he would guarantee that it would be filled. I handed it back to him and said I would see about it in the morning. I did not say, "I would consider the matter and give him an answer next morning." We met the next day probably about nine or half past nine o'clock, I cannot remember the exact time. I saw Major Hinkle on the night of the 31st of October. I think I saw him before and after I saw Houston. I don't remember that I mentioned to Hinkle on this evening the proposition to assign the Mosty contract. I may have done so, but I don't remember whether I did or not. I saw Major Hinkle the next morning before I met Mr. Houston. I then mentioned to Hinkle the proposition of Houston to assign to me the Mosty contract.

Hinkle and myself talked about the matter a few minutes. We did not consult about it. We talked about the proposition of Houston to assign to me the Mosty contract.

The only reason why I wished to postpone giving Houston an answer about the transfer of the Mosty contract was that we were to meet the next morning to complete our arrangements. I had no other reason why I did not accept or reject Houston's proposition when he first made it to me on the evening of October the 31st, more than it was late in the evening and we were to meet the next morning to complete the transaction.

I do not think I had any conversation with any other person concerning the proposition made by Mr. Houston to transfer the Mosty contract prior to the time it was transferred to me.

I don't think W. S. Carothers was in town at this time. I did not communicate with anyone or in any

manner in relation to the proposition of Houston to transfer the Mosty contract previous to its transfer, except the talk I had with Major Hinkle. Major Hinkle, to a certain extent, conducted the previous negotiation with Houston for me. He introduced Mr. Houston to me, and was instrumental in bringing about the trade, and talked up the cattle. (The plaintiffs' counsel here suggested to the witness that he did not probably understand the import of Maj. Waelder's question; that Maj. Waelder was asking if Maj. Hinkle was acting as his agent. This suggestion of plaintiffs' counsel was taken down at the suggestion of defendant's counsel, and the witness then proceeded as follows:)

I did not understand the question as asked by Major Waelder. Major Hinkle was not acting for me in any way, but he stated to me that he was authorized by Mr. Houston to find him a buyer for those cows, and he was instrumental in making the trade.

In making the assignment of the Mosty contract Houston proposed and agreed to transfer all of his right, title and interest in the Mosty contract, and all interest in the money which he had advanced on the same. It was not also agreed that the Mosty cattle should be counter-branded to me without expense to me. I do not think anything was said about counter-branding the cattle. In speaking with Houston about McAnulty being a partner of Mosty's, Houston did not tell me that Mosty told him so, but that McAnulty had told him so. I stated yesterday that I knew McAnulty to be solvent. I knew this from his general reputation among cattle men. I knew that his reputation was number one, good.

Cattle men know, in a general way, the financial standing of each other. In speaking of the twelve hundred

head of cows which Houston said Mosty had in his rail-brand, he stated that he had received this information from Mosty; that Mosty had told him so. I also stated yesterday that I knew Houston to be solvent. I ascertained this from several cattle men, and his general financial reputation among cattle men was good. I ascertained Houston's reputation financially at different times, and from his transactions in cattle, and I made inquiry of a number of cattle men at the time of making this transaction. I also made inquiry of Lockwood, the banker. I made inquiry of Lockwood about the time of making the first contract or on the following day; I think it was about this time. Lockwood is my banker in this city. I went to Felix Smith to have the assignment of the contract drawn at the suggestion of Mr. Houston. The terms of the assignment were agreed upon in Major Hinkle's office. We then went to Mr. Smith's office together, and Mr. Houston stated the terms of the assignment to Mr. Smith, and Mr. Smith then drew the terms of the assignment on the contract.

Question: You stated yesterday that you had bought other cattle, for which reason you did not have the money to pay Houston, and therefore gave him a time draft. State now when you bought those other cattle, from whom, and about how many.

(The plaintiffs' counsel objected to the question because it is irrelevant.)

Answer: I had a man in our employ, J. R. Pennington, buying cattle in Hunt, Kauffman, Fannin and adjoining counties. I am unable to state the names of the parties he bought from at that time. The whole number bought and contracted for in October and November was in the neighborhood of five thousand head. I stated I

gave Houston a time draft payable on November 15. Lockwood did not tell me that Houston had endorsed it; he told me he had discounted it, and Houston told me himself he had discounted it. The draft was dated on the first of November, and on the second of November Lockwood told me he had discounted it. The draft was made payable to R. A. Houston or order.

Question: It being payable to order, could he discount it without endorsing it?

Answer: I don't think he could, as that is the usual way of disposing of paper of that kind. I paid the draft at the time it was due.

When I paid it I think it was endorsed by Houston. His name was written on the back of it. I cannot tell the exact day on which I paid it. We had a running account at the bank, and I cannot tell the exact day on which I paid it. I have known W. S. Carothers, I think, about two years. His ranch adjoins our ranch, and he passes through our pasture in going to and from his ranch. I presume Carothers made his home in Austin at the time of these transactions with Houston, but he was going back and forth to and from his ranch. I don't think I ever talked over any of my business matters with Carothers, except so far as our mutual interests were concerned in the division fence between our land. I may have spoken to him about my cattle purchases in a general way, but I do not remember talking to him about any particular transaction. I presume Carothers knew of my purchase of the Mosty contract, although I never informed him in any way that I know of. I stated yesterday that I received a dispatch from Carothers on the 9th or 10th of November. This dispatch was sent from San Antonio, and was handed to me by Mr. Piper at Uvalde. I had arrived at

Uvalde the same night the dispatch was received there. I was not expecting a dispatch and did not go to Uvalde for that purpose. I was expecting Carothers in person, as we were to run a division line between us, and were to meet at Uvalde for that purpose. I know how Carothers came to dispatch to me. Mr. Carothers stated to me after my arrival in San Antonio in response to his dispatch, that when he left Austin on the train to come to San Antonio he met George W. Littlefield, who had just returned from Lampasas, and he had told him all about the Mosty failure; and as he knew where I was he advised me of the fact immediately on his arrival at San Antonio the same night.

I came to San Antonio in answer to this dispatch on November 10th or 11th. By reference to my memorandum of expenses I find I left Uvalde on November the 11th, and arrived at San Antonio the same night. From San Antonio I went to Austin, and from there I went to Lampasas. I was in Austin only a few hours. I saw at Lampasas Judge Ecker and a man named White, who had charge of some of the Mosty cattle on behalf of Mr. Littlefield. I saw also the county clerk and other parties whose names I do not know.

Question: In your conversation with the parties named did you learn that the partnership between Mosty and McAnulty had been dissolved?

Answer: I learned that a partnership which had been formed between McAnulty and Mosty had been dissolved on or about the 7th of October, 1881. I saw a record of a bill of sale from Mosty to McAnulty of all his cattle.

I did not see a notice of the dissolution of the partnership between Mosty and McAnulty. I was informed by Judge Ecker, who drew the papers, that that partnership

had been dissolved. Judge Ecker did not show me a notice of dissolution. He stated to me that such a notice existed, and was on record. He did not show it to me and I did not go to see it. I did not go to see it because I relied on Judge Ecker's statement as sufficient. I was satisfied that the facts were as stated by Judge Ecker, and for that reason I did not deem it necessary to look into the matter further after his statement. I was at Lampasas one day and one night. There was a telegraph line to Lampasas at that time.

Question: With what line of telegraphy did the telegraph line at Lampasas connect?

(The plaintiffs' counsel objected to the question because it was immaterial.)

Answer: I do not know. I sent a dispatch from there to Major Green at Austin. In sending the dispatch I did not ascertain what line it was and do not now know. I do not kuow whether the telegraph line at Austin is or is not a part of the general system of the Western Union Telegraph Company. I don't know whether any point in the country can be reached by telegraph from Austin, but I presume it can; I have telegraphed from Austin. I have sent messages from Austin to Waco, to St. Joseph, Missouri, and to San Antonio. I don't remember to have sent any to any other point from Austin.

(The complainants' counsel objected at the time, and still objects to all questions above in relation to telegraph lines, it being immaterial to any question at issue.)

From Lampasas I went down to Georgetown by private conveyance, and from Georgetown by train to Austin, San Antonio and Harwood, and from Harwood by stage to Gonzales. I left Lampasas on the night of the 15th of November, and arrived at Gonzales on the night of the

17th. I saw Houston on the morning of the 18th, the following morning after my arrival at Gonzales. I had part of my conversation with Houston at Gonzales at the bank of Littlefield, and a part of it on the sidewalk. I believe the bank is known as the bank of Dillworth & Lewis. I met Mr. Dillworth in the bank; he was not present during our conversation. I don't remember that our conversation on the sidewalk was in front of any store; we walked out of the bank and sat down, I think, on some lumber; from there we walked over to the hotel and sat on the hotel porch. I stated to him that I had ascertained that Mosty was broke up, and that I had gone up to see what could be done, and had found that Mosty had transferred all his property early in October, and before I had received from him the assignment of that contract, and that he must have known of Mosty's condition before that assignment was made; and I wanted him to fill the contract or return the money we had paid. He stated that he did not consider that he was bound to do either, and that he had no knowledge of Mosty's condition at the time he had made the assignment. He positively refused and declined to do anything in the matter whatever, or to fill the contract or to pay the money. This was in substance about the conversation we had. I have stated in substance, as near as I can recollect, all that Houston said in these conversations. I remember stating to him that we had paid him fifteen thousand dollars for no consideration, as the contract was worthless before he had transferred it to us. He said he had sold the contract and had got his money and intended to keep it, and that we would have to look to some one else for our money. He said he had assigned the contract without recourse, and he did not think he was liable. I did not give him the first information of the failure of Mosty. I think he said Capt.

Littlefield had first informed him. I stated to Houston that he had misrepresented the matter to me; that McAnulty was not a partner of Mosty in that contract, and that a special contract which existed between Mosty and McAnulty had been dissolved some time early in October.

Question: Did not Houston tell you in the course of the conversation referred to by you as having taken place at Gonzales, that he had never represented to you, as facts in his own knowledge, that Mosty was solvent, and that McAnulty was his partner, but had stated to you when the assignment was made that Mosty had made these statements to him, and that he (Houston) believed them to be true, and did you not then (meaning in those conversations) assent to Houston's statements as true?

Answer: Houston stated that he considered the contract good, or he would not have advanced the money on it, and that he considered McAnulty was a partner, but that he had not represented that McAnulty had told him so, but that Mosty had told him so. He did not say at that time that Mosty had made those representations to him, and I did not assent to the statements made by Houston at that time in regard to the matter. Houston stated at that time that I was mistaken in saying that he had told me that McAnulty had told him that he (McAnulty) was a partner in that contract, but said, "I told you that Mosty had told me so." He did not say anything at this time that he had represented that Mosty was solvent, or that he had received the information of Mosty's solvency from him, but said that he considered the contract was good when he made the assignment.

RE-DIRECT EXAMINATION.

Capt. Nanson became interested in the ranch some time in 1882, I think. The only parties interested, directly or indirectly in the trade made with Mr. Houston was Capt.

Hillard and myself. At the time the trade was made with Houston there was about forty-one thousand acres of ranch land owned by Capt. Hillard, Mr. Barnard and myself. Mr. Barnard was then a resident of St. Joseph, Mo. Mr. Barnard furnished no part of the money paid Mr. Houston on the contract; it was all furnished by Capt. Hillard and myself, and the assignment taken to Capt. Hillard and myself. I do not know all of the cattle men who drive cattle from Texas to Fort Dodge, Caldwell and other northern cattle markets. I never knew Mr. Mosty or anything about his financial standing. I stated to Maj. Hinkle on the morning of November the 1st—

(The defendant's counsel here objected to the question and answer upon the ground that any conversation between the witness and Maj. Hinkle is inadmissible, unless such conversation was had in the presence of the defendant Houston.)

—that I would not take the assignment of the Mosty contract because I knew nothing about Mosty, and that we would go and complete our original contract. He said he considered that contract perfectly good, and that if R. E. McAnulty was a partner in the contract—and he was satisfied McAnulty was a partner in the contract, as Houston had told him so—that no cattle contract in the State of Texas could be made any better, as McAnulty was as sound as any cattle man in the state; and that he knew Mosty was good, as he had handled at least twenty thousand head of cattle that season, and had made a lot of money. Hinkle advised me to take an assignment of that contract instead of completing the other. This was a short time—probably half an hour—before Houston came to the meeting. At this time Hinkle was agent for the Texas Live Stock Journal, and his opportunities were very good for knowing the cattle men generally through-

out the state. Mr. Houston offered to pay Smith for writing the assignment, but I think he declined to accept anything. I had never met Judge Smith before. I did not suggest that any attorney should write the assignment. Mr. Houston said he knew Judge Smith, and suggested that we go to his office and have him write it. When I stated to Mr. Houston that I had not sufficient money then here to pay the advance, but would have to give him a time draft until the money could be placed to our credit by Capt. Hillard, he said it was all right, that it made no difference to him, as he did not need the money then at any rate, and I could make it payable at ten or fifteen days and it would be satisfactory to him.

Question: Did Mr. Houston deny at Gonzales having made the representations to you, concerning which you have testified, or did he merely contend at that time that he had made such representations upon belief, and not as facts?

Answer: He did not deny the representations made, except he denied that he had stated that McAnulty had told him he was a partner of Mosty's, and said Mosty had told him so; this conversation at Gonzales was after Houston knew of the insolvency of Mosty.

RE-CROSS-EXAMINATION.

Mr. Barnard was to have an interest in the cattle ranch, provided he furnished his share of the money, and he had furnished no money up to the time of this transaction.

Question: If one of the partners advanced money for the common purpose of establishing the cattle ranch, would the other partners be charged with their proportion of the money so advanced?

(The plaintiffs' counsel objected to the question because neither the question nor the answer is admissible, on the ground that it is asking an opinion upon a question of law.)

Answer: I don't know whether they would or not.

Question: Would the advancing partner be credited with the amount advanced?

(Plaintiffs made the same objection.)

Answer: He would; the land was first purchased, and the ranch was to be established, and each party was to have an interest in the cattle when they paid in their proportionate amount of money; I paid for the first forty-one thousand acres of land purchased at Austin with money furnished by Capt. Hillard, Mr. Barnard and myself; the title was first taken in the name of Mr. Barnard and myself, and we deeded one-third interest to Captain Hillard; all the cattle now on the ranch, and all purchased since its establishment, belong in common to the joint owners of the land.

QUESTION BY EXAMINER.

Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer: I do not know of anything.

Mr. Alonzo Millitt testified on behalf of the complainant; I am thirty-nine years of age. I reside at San Antonio, Texas, and I know Robert A. Houston, the defendant in this case. I saw him about the middle of October, 1881, during the fair week, at San Antonio, at the Hord Hotel.

(The defendant here objected to the question and answer of the witness as to any conversation he may have had with the defendant Houston concerning the cattle trade between the witness and defendant Houston, as irrelevant to the issue.)

Mr. Houston first asked me if I was buying cattle. I told him I was. He then told me he had some cows to sell. I asked him where they were. He told me one lot of fifteen hundred was about Lampasas, and that he had about one thousand in Gonzales. I then asked him who was to deliver the cattle at Lampasas. He told me Lee Mosty. I then remarked that that trade wouldn't be filled, and we wouldn't talk trade about that lot; and those at Gonzales we could not agree about the time of delivery. I wanted them in the fall, and he wanted to deliver them in the spring. He asked sixteen dollars a head for the cattle.

Question: State whether at that time you knew anything of the solvency of Mosty.

(The defendant objected to the question for the reason that the knowledge of the witness could not affect the defendant unless it had been communicated to him.)

Answer: I had my suspicions aroused. I had met Capt. Littlefield, four or five days previous to meeting Houston, who had told me that he had advanced Mosty ten thousand dollars to buy cattle, for which he hadn't a scratch of a pen, and considered it as good as lost. I also met Mr. Towers at Denison, who had also made an advance of money to Mosty, and had been looking him up to recover his money. Mr. Littlefield lives at Gonzales.

(The defendant objects to that part of the answer, also, in which the witness relates his conversation with Littlefield and Towers, for the same reason stated in the previous objection.)

D. W. Hinkle, witness for the complainants, testified as follows: I am forty-six years of age, and live at San Antonio, Texas. I am one of the proprietors of the Stock Journal Publishing Company, published at Fort Worth, and one of the Texas Investment Company, and manage a department of both concerns at San Antonio. In October and November, 1881, I lived in San Antonio, and my business was then the same as now. At this time I knew Buzard and Houston, two of the parties to this suit. I have known Houston seven or eight years; I have known Capt. Buzard about a year and a half.

(The defendant here objected to the question and answer of the witness for the reason that the contract and assignment about which he is being interrogated are in writing, and appear to be so by the pleadings of the parties, and speak for themselves; and any antecedent conversations relative thereto are not admissible as evidence.)

In October, 1881, Mr. Houston asked me to sell two thousand head of cows for him which he had contracted with L. A. Mosty. He represented to me that most of those cows were then on hand in Lampasas county. I sold the cows to B. F. Buzard, by and with the consent of Mr. Houston, and in his presence, and drew up a memorandum contract of the price and class of cattle, which was signed by both Buzard and Houston, and payment of five hundred dollars was made by Buzard to Houston binding both parties to meet next Tuesday and ratify it.

(Exhibit "A" to defendant's further answer was here shown the witness—see record, page 283, for this exhibit,) who then said:

This is the memorandum agreement to which I referred. It is in my hand writing. I advised Buzard to buy the cattle mentioned in this memorandum contract,

because Mr. Houston had told me that the cattle were then nearly all gathered and on hand in Lampasas county, and R. E. McAnulty was Mosty's partner in that contract for delivery. The next day Houston failed to put in an appearance, and was absent for some ten days or two weeks. At the end of that time Houston came to San Antonio and asked me to get Buzard to let him off from the contract and to take his original contract with Mosty in lieu of it. As Capt. Buzard was present, or in the city, I got him and Houston together, and Houston told him that, as his business would prevent his giving his personal attention to the delivery of the cattle, he would deduct twenty-five cents per head if Buzard would substitute Mosty's contract in place of his. Buzard asked me if Mosty's contract with Houston was good. Houston answered, he being present, that R. E. McAnulty was a partner to the contract, and the most of the cattle were gathered and then in the rail brand in Lampasas county. Based on that statement, I advised Buzard to take it. Mr. Houston then paid me my commission and I had nothing further to do with it. Houston told me that McAnulty had told him himself that he was a partner of Mosty's. Houston said that Mosty was as good financially as he was. All this conversation occurred in the presence of Capt. Buzard. Capt. Buzard said he didn't know anything about Mosty; that he knew Houston was good; and told Houston he would only make the transfer to accommodate him. Buzard told Houston that he would accept the transfer of that contract, relying on Houston's statement that both McAnulty and Mosty were interested in the contract, and were perfectly responsible. Buzard was to relieve Houston of the trouble of going up there, and take Mosty's contract—I mean an assignment of it—in lieu of Houston's contract, for which Houston deducted twenty-five cents per head. I was acting as agent for Houston in the sale of the cattle.

Buzard asked me concerning the solvency of Mosty at the time of the interview with Houston and just before. When the inquiry was made by Buzard about the solvency of Mosty, when Houston was present, Houston answered it. After the answer of Houston to this inquiry, I told Buzard that if R. E. McAnulty was a partner of Mosty, it made the Mosty contract as good as the bank, and I then advised him to take the transfer. He had declined to take the transfer of the Mosty contract in place of the other up to this time.

Buzard stated that, as he didn't know Mosty, he would have to rely on our joint statements that Houston's contract with Mosty was good, and, relying on that statement, he would accept the transfer. They then left my office together, and I never saw the transfer they drew up until some time after. I kept the memorandum contract in my possession from the time it was drawn up until this transfer was made. I did not know the financial standing of L. A. Mosty at that time. My opportunities at that time of knowing the financial condition of cattle men generally were perhaps better than those of any man in the state. I had a considerable knowledge of Texas cattle men generally.

CROSS-EXAMINATION.

In speaking of the cows which Houston said were on hand, he did not tell me that Mosty had told him so; he ought to have known whether they were on hand or not, as the time of delivery from Mosty to him had been postponed on account of dry weather. When I first spoke to Buzard about the sale of the Houston cattle I told him they were the Mosty cattle which Houston was offering to sell, and I specified the county in which they were. It was the Mosty cattle that Buzard was bargaining for at

the time the memorandum agreement was made, and Buzard so understood it. When Houston spoke of McAnulty as being a partner of Mosty, he said that McAnulty, and not Mosty, had told him so.

I think that Mosty had handled some ten or twelve thousand cattle that year; I don't think it was more than that. He had failed to comply with some of his contracts that spring. I knew McAnulty to be perfectly responsible of my own knowledge.

When I advised Buzard to take the transfer of the Mosty contract, I did so upon my own knowledge of the responsibility of McAnulty, and not upon the representations of Houston as to McAnulty's responsibility; I did not think the contract was good without McAnulty's being on it.

I had an interview with Buzard the night before the transfer of the Mosty contract was agreed upon; Houston was present at this interview; the transfer of the Mosty contract was then spoken of; I believe I was the only party who spoke of it. Nothing was agreed upon that night in reference to the transfer. Buzard said he would like to have a talk with me and see what I thought of it. The matter was postponed until the next day—the whole conversation and trade. Buzard did not say he would give him an answer the next morning; Buzard did not make his appearance at my office the next morning before Houston.

I saw Houston and had a talk with him the next morning before I saw Buzard. Buzard came in while Houston and myself were talking. The trade was then closed in that interview. I think Buzard knew something of the financial standing of McAnulty; I think he knew him to be perfectly good as well as myself.

I gave Buzard advice while I was acting as the agent of Houston, because he was a stranger in the state, and because Houston asked me to induce him to make that transfer. I would not have given him the advice if I had not known McAnulty to be perfectly good. I did not believe Mosty to be good; I didn't believe the contract was worth a cent unless McAnulty was on it.

Question: Had you learned from any other source or sources at that time that McAnulty was a partner of Mosty in the cattle business?

Answer: I had heard that Mr. Houston had so reported from various sources, and I knew that somebody must be furnishing Mosty the money to operate upon.

Question: When you started to answer the last question, you commenced by saying that there was a general rumor, when you were stopped by the objection to the question; please state now what was the general rumor you were about to testify to.

Answer: I had tried to sell those same cattle to Millitt, to Tom and John Deweese, H. D. Sullivan, and they all told me the contract was worthless, and would never be filled; and Sullivan told me it lacked McAnulty's signature to make it binding.

Question: Now, please answer the question if you had heard from any other source or sources, except through Houston, that McAnulty was a partner of Mosty in the cattle business.

Answer: Only from parties to whom Houston and I had tried to sell the cattle. They did not get the information from me. Buzard was the only man I ever told that Houston said that McAnulty was a partner in the Mosty contract, and Houston never told me that McAnulty was a partner with Mosty in the general cattle business.

In October and November, 1881, I knew a man in San Antonio, from Gonzales, named R. S. Walker, or Rufe Walker. Walker came as a messenger from Houston to Buzard, informing him that Houston could not comply immediately with the contract, because he was sick, but would do so as soon as he was well; this was between the time when the original memorandum contract was made, and the time of the transfer of the Mosty contract. I believe Walker came here in answer to a verbal promise made by Houston to Buzard to meet him, and to explain the reason why Houston could not meet him. I can't tell how many days this was after the original memorandum contract was made. I stated Buzard wanted to have a talk with me before he gave Houston a definite answer. I had this talk with Buzard; in this talk I did not tell him of Mosty's financial condition; I told Bnzard that as Houston said the cattle were gathered and in the rail brand, and were then in Lampasas county, and R. E. McAnulty was a partner to the contract, I considered the contract good. I did not tell Buzard that the Mosty contract was not good unless McAnulty was on it. Houston paid me at that time twenty or twenty-five dollars for my commission in drawing up that contract. He didn't pay me any commission for making the sale, as I didn't think I made it. He paid me for my commission and assistance generally. He paid me the amount I mentioned in cash. Buzard paid me nothing for advising and assisting him; I was acting as the agent of Houston and not as the agent of Buzard.

The witness, D. W. Hinkle, then requested to make an alteration in his testimony. The witness then stated: I wish to change my testimony on page 46, which reads: "He ought to have known whether they were on hand or not, as the time of delivery from Mosty to him had been

postponed on account of dry weather," to read: "I knew that other contracts with Mosty had been postponed on account of dry weather, and that Houston knew that Littlefield's contract had been postponed on account of it."

Testimony of Thomas Deweese, witness for complainant: My name is Thomas Deweese; am forty years of age; Live in Bexar county, Texas, and am a stock raiser. I believe I know Capt. Buzard, Mr. Hillard and Robert A. Houston when I see them. Personally, I have not known Mr. Houston a great while. I have not known either of the other parties a great while. I never met Mr. Houston until about eighteen months ago. I met Mr. Houston, as near as I can remember, in San Antonio, while the Federal Court was in session here in the fall of 1881; the exact date I cannot remember. At that time I met him here he made us a proposition to sell us some cattle—cows; a part of them was in Gonzales county and a part of them in Lampasas county, I think. I don't know what cows they were in Lampasas county. I had a talk with Houston about some cows in Lampasas county for which he had a contract with another person. I don't remember that he told me with whom this contract was made. The cattle he offered me were from eight hundred to a thousand head in Gonzales county, and from twelve to fifteen hundred in Lampasas county. This conversation, as well as I remember, was in the afternoon, after dinner, and I told him I would see him the next morning. I met him the next day, and he told me he had sold the Gonzales cattle to Coleman, Fulton & Co. He asked me then if I wanted to trade for the cows up the country, and I told him no; that we did not want them without the Gonzales cattle. The reason why I did not want to take the Lampasas cattle was because Houston would not agree to deliver them at our pasture, and we did not wish to

handle them at Lampasas, or wherever they were. We proposed to take the Gonzales cattle at Gonzales county. The pasture where we wanted the Lampasas cattle delivered is in Wilson, Atascosa and Karnes counties. I don't think I had met either Capt. Buzard or Capt. Hillard before this talk with Houston. I don't remember having met either. I may have met Buzard.

Testimony of John W. Gamel, a witness for complainant: My name is John W. Gamel. I am thirty-seven years of age. I reside in Mason county, Texas. I am a stock raiser. I know B. F. Buzard and Robert Houston. I do not know Moses Hillard. I knew Buzard and Houston in the fall of 1881. During the fair at San Antonio in 1881 I had a talk with R. A. Houston about some cows—about one thousand head; they were in Lampasas county. I don't know who was to deliver them. The conversation was simply this: I wanted the cows, and he didn't want to let me have them. The reason why he didn't want me to have them was that he said they were not good enough, or something that way; that he would rather put them off on this other party. I don't remember that Houston said there was any doubt about the delivery of the cattle. He simply said I was a friend of his, and he did not want me beat, or something like that. He did not claim to have the cattle then; only claimed to have a contract for them.

CROSS-EXAMINATION.

This conversation was at Hord's hotel, in San Antonio. I don't believe any one else was present; there was quite a crowd around us; we were sitting, as well as I recollect, on the sidewalk in front of the house; I did not make him an offer for the cattle.

Testimony of R. E. McAnulty, witness for the complainant: My name is R. E. McAnulty. I am thirty-four years old. I reside at Albany, Shackelford county, Texas. Am acquainted with the plaintiff, Benjamin F. Buzard, and the defendant, Robert A. Houston; I am not acquainted with Moses Hillard. Have heard of the object of this suit; have heard that the object of this suit was to cancel and rescind a cattle contract between Houston and L. A. Mosty, which was assigned to plaintiff, or something of that kind.

I don't know anything of my own knowledge about the contract; have heard Houston say that he made a contract with L. A. Mosty, and have heard Mosty say that he made a contract with Houston concerning cattle; don't know the date of the contract between Houston and Mosty; have heard that it was made in August, 1881. I don't know its terms and conditions, only from what I have heard Mosty and Houston say about it. I never had any connection with or interest in said contract whatever. The first I knew or heard of the contract was from statements made by Houston and Mosty in Dodge City, Kansas, on or about the day when they said the contract was made; That is to say, about August, 1881.

I have stated that I know nothing of my own knowledge of the terms and conditions of said contract, and that I never had any connection with or interest in said contract; I had no connection, interest or responsibility with or in said contract. There was no partnership relation existing between Mosty and myself at the time said contract was made. There was a partnership formed between Mosty and myself on the 17th day of August, 1881, but said contract or partnership between Mosty and myself did not affect, concern or embrace said contract between Mosty and Houston or any other pre-existing con-

tract between Mosty and other parties. I was not to receive any benefit whatever from said contract between Houston and Mosty, and did not assnme any responsibility therefor. I never had any partnership contract or any other contract with Mosty, at any time, affecting or concerning said contract between Mosty and Houston.

I entered into a partnership with L. A. Mosty in the cattle business at Kansas City, Missouri, on the 17th day of August, 1881; the terms of the contract are embraced in the original contract, which I attach, and mark Exhibit "A".

Copy of original articles of copartnership attached to McAnulty's deposition:

Articles of copartnership made and entered into this 17th day of August, 1881, by and between R. E. McAnulty, of Austin county, Texas, and L. A. Mosty, of Lampasas county, Texas, witnesseth:

1st. That said parties have this day entered into a copartnership, for the purpose of raising, buying and selling stock in the State of Texas, and adjoining territory.

2d. That said copartnership shall be known as "McAnulty & Mosty," and shall continue until dissolved by mutual consent or death of either party.

3d. That said stock raised or bought by said firm shall be branded thus (X) on the left side of the animal, and every animal so branded shall be known as the property of said firm.

4th. The capital stock of said firm shall be fifty thousand dollars or more, contributed as follows: Said McAnulty is to furnish the sum of fifty-thousand dollars, or more, and said Mosty is to give his personal attention to said business, snch as managing and superintending ranches, hiring help, buying and selling stock, and everything necessary to be done in order to successfully prosecute and carry on said business.

Witness our hands and seals this 17th day ot August, 1881.

(Signed in duplicate) R. E. McAnulty. (SEAL)
L. A. Mosty. (SEAL)

Attest:
John S. Harbison.
R. L. Harper.

This contract was ended on October the 7th, 1881, at Fort Worth, Texas, by a dissolution of partnership, for the reason that Mosty did not comply with the terms of the contract of partnership, and was paying too much for cattle. I had furnished the money, and he was to do the buying, selling, &c.

I am the R. E. McAnulty referred to, and L. A. Mosty, formerly of Lampasas county, Texas, is the Mosty referred to.

The contract of partnership between Mosty and myself was made and executed at Kansas City, Missouri, on the day it bears date, to wit: August 17th, 1881. I never had any other contract of partnership with L. A. Mosty in my life. At the beginning of said partnership I placed in the Merchants' National Bank, of Kansas City, Missouri, fifty thousand dollars, which sum Mosty drew out. On September 20th, 1881, I paid to Mosty in person, at Albany, Texas, six thousand dollars. I afterwards paid out fourteen thousand dollars on cattle which Mosty had bought on account of the partnership and failed to pay for, making the sum of seventy thousand dollars in cash that I paid to Mosty and for cattle on account of the partnership. Mosty never paid me a cent of money on account of said partnership, and never returned to me a cent of said sums of money. I received from Mosty at the time of dissolution of partnership a bill of sale to the cattle Mosty had purchased with my money, from which I realized the sum of forty-four thousand dollars in money, and for which there is now due me the sum of fourteen thousand dollars from a party to whom I sold a part of the cattle, leaving me a loss of twelve thousand dollars, besides various expenses.

I don't know that Mosty received any money from

Houston. If he did receive money from Houston I do not know the amount, and I do not know what Mosty did with the same. I know that I never received any part of it at any time.

I was in no way bound, as a partner or otherwise, for the fulfilment of said contract between Houston and Mosty, and I know nothing about said contract save the street conversation I had with Mosty and Houston about the same, and I never handled any of the money arising from said contract.

As I have said before, our partnership commenced on the 17th day of August, 1881, and ended October 7th, 1881. It was understood between us that he was to buy steer cattle, and nothing but steers. This was a verbal agreement. He bought stock cattle and steers. This was one cause of the dissolution; that is to say, because he bought stock cattle, contrary to our verbal agreement.

The partnership was dissolved on the 7th day of October, 1881, by mutual consent. I was not indebted to Mosty in any sum; he was indebted to me, and executed and delivered to me the bill of sale above mentioned to cover said indebtedness. He was indebted to me in the sum of seventy thousand dollars, as above stated, on account of the monies I had advanced him for the purpose of buying cattle, and on account of cattle he had bought but had not paid for, as above set forth. I never advanced any more on account of the partnership after the said dissolution.

I received from Mosty a bill of sale to cattle, the actual number not known, which I sold for the gross sum of fifty-eight thousand dollars, of which I have received forty-four thousand dollars.

The property I received consisted of cattle; about thirty-

eight hundred head were then on the road to the Panhandle under herd, of which actual possession was delivered to me. The balance consisted of cattle running on the range in Lampasas and adjoining counties in Texas, of which I received possession by what is known as "range delivery"; on the thirty-eight hundred head before mentioned, on the road to the Panhandle, I paid all expenses on after October the 7th, 1881, and the persons in charge of the herd were considered my employes and agents. At the time of the dissolution at Fort Worth, Texas, at which time possession was given to me individually, Mosty was in Fort Worth, and Goorge B. Loving was present. My possession was open and notorious. I was in possession before that date so far as one partner can be deemed to be in possession of the partnership property.

I dissolved my partnership with Mosty for the reason that he was not buying the kind of cattle he had verbally agreed with me to buy, and because he was paying prices for cattle which I deemed too high; and for the further reason that I heard that some of his individual checks had been dishonored. I did not know at that time whether he was solvent or insolvent. From the way he did business I could not tell. Since that time I have ascertained that he was indebted to G. W. Littlefield, the Lee-Scott Cattle Company, Towers & Gudgell, and Fairchild; said debts being contracted on account of cattle.

I do not state that said Mosty was insolvent at the time of dissolution. I had heard before that time that he had made contracts with Littlefield and Houston. Have heard since about his other indebtedness. Mosty has no property that I know of subject to execution, but I understand that he has plenty of money.

I am acquainted with Mr. Henry Stephens, who lives

somewhere in South Texas; don't know where his home is; he is a cattle man. I have no recollection of any acquaintance with Henry Heath and A. J. Covington. I may have met them, but do not recollect them at this time. I never had any conversation with them upon the subject of my copartnership with Mosty, and never had any conversation with them, or either of them, with regard to my connection with or liability on the contract between Houston and Mosty, as I never had any connection with the same, and never contemplated having any connection, interest or liability with the said Houston and Mosty contract.

CROSS-EXAMINATION.

I never had anything to do with the said contract between Houston and Mosty; never agreed to include the same in my partnership contract with L. A. Mosty; never agreed to share in either the profits or losses of the same. On the contrary, I told Mosty at the time I entered into copartnership with him that I did not wish to have anything to do with his antecedent business.

My partnership contract with L. A. Mosty was formed on the 17th day of August, 1881, and was reduced to writing on the same day.

I first learned of the contract between Mosty and Houston at Dodge City, Kansas, through conversations had with Mosty and Houston about the time said contract was made, if it was made at all; that is to say, some time in the early part of August, 1881. If any cattle embraced in the Houston and Mosty contract ran in the same range with cattle belonging to myself and Mosty, I do not know it. I do not know anything about any such cattle embraced in the Houston and Mosty contract.

I do not know anything about the fifteen thousand dol-

lars mentioned as having been paid by Houston to Mosty. If said sum, or any other sum, was paid by Houston to Mosty, I do not know what Mosty did with it., I do know that Mosty and myself together never did invest said sum.

I never received any cattle from Mosty which had been sold or contracted by Mosty to Houston. If Houston had any sort of right or claim to or interest in the cattle which I received from Mosty at the time of said dissolution I did not know it then and do no not know it now.

I do not state that Mosty was solvent or insolvent at the time of the dissolution, or afterwards; I do not know which of his creditors, if any, were aware of his pecuniary circumstances.

No one has been present during the time I have been answering the above interrogatories, save the officer before whom my deposition was taken.

(The complainants here rested.)

Testimony of G. N. Dilworth, a witness for the defendant: My name is G. N. Dilworth; I am past forty-five years of age; I reside in Gonzales county; am a banker by occupation; I was engaged in banking in August and September, 1881. About September 30th, 1881, I received a draft from Ball, Hutchings & Co., drawn by L. A. Mosty on Robert Houston for eight thousand five hundred dollars. Mr. Houston was not in town at the time I received it, and I had to hold it for several days until he came in. He came in on October 7th, 1881, and instructed me to pay the draft and charge it up to him, which I did on that day. About this time, and up to November 1st and 2d, 1881, Houston kept his banking account with me.

(Plaintiffs' counsel objected to the above question and answer, because the same are irrelevant.)

At this time Houston was indebted to me about twelve thousand dollars; that is, from the 7th of October to about the 1st or 2d of November. I knew nothing of Mosty's financial condition about November 1st or 2d, except I believed him to be good. I knew nothing to the contrary until some time about the last of November. I gave Houston advice how to transfer the Mosty contract. I advised him to transfer it without recourse, and he remarked that he didn't know how it ought to be done. I told him to get a lawyer to draw up the transfer. I told him if, in the spring, there should be any trouble about the number of cattle, or their delivery, he would have to go up there and see about it if he sold the contract and guaranteed it. This conversation took place a day or two before the transfer to complainants.

(Plaintiffs' counsel objected at the time to all the foregoing conversations between witness and defendant, because neither of the complainants were present at the time of the conversation, and therefore it is irrelevant.)

At the time I gave Houston the advice to transfer the Mosty contract I had no knowledge of Mosty's insolvency, had heard no remarks to that effect, and had no suspicion that he was insolvent.

CROSS-EXAMINATION.

I first spoke of the transfer of the contract when he told me he had sold the contract, and was coming up to San Antonio to close the trade. I then suggested the method how it should be done; he told me he had sold, or was about to sell the contract, and not the cattle; I don't remember the date of the conversation; he was then preparing to come up to close the trade; he had left his

home and was then on his way up. I knew Littlefield had a contract with Mosty for some cattle, and the time of delivery had been postponed, the reason given being on account of dry weather; I mean to say this was not a contract made direct with Mosty and Littlefield, but with Mosty and Bennett, and that it was transferred by Bennett to Littlefield; I knew nothing of my own knowledge of Mosty's financial standing, only from general reputation.

RE-DIRECT EXAMINATION.

Mosty's general financial reputation was that of a solvent, responsible man up to the latter part of October or first of November, 1881.

RE-CROSS-EXAMINATION.

I knew nothing of Mosty's financial reputation, except at Gonzales, and I got my information from men who had had dealings with him; the Bennett Brothers—I believe there are three of them in the firm—and Louis Robinson are persons whom I heard speak of Mosty's financial condition, besides Houston and Littlefield, and there were others whose names I cannot now recall.

Testimony of L. G. Robinson, a witness for the defendant: My name is L. G. Robinson. I am forty years of age. I live in Lavaca county, Texas. My occupation is a cow and sheep raiser. In September, October and November, 1881, I was buying cattle in my county, in Fayette and adjoining counties. During this period I was acquainted with L. A. Mosty. I had known him since 1877. I had had business transactions with him from 1877 to 1881. I had sold him a herd of cattle every year, and had sometimes bought cattle for him during this period. Mosty's financial standing in August and September, 1881, was good, so far as I know.

In September, 1881, I met R. E. McAnulty, and had heard of him before. Met him at Belleville, Austin county, Texas. Mr. Mosty and Mr. Bennett were present when I met him. Mr. Mosty informed me when I met him at Belleville in September, 1881. that McAnulty was a partner of his.

(Plaintiffs' counsel objected because it is not a proper way to prove partnership, and because it is immaterial.)

McAnulty, Mosty and myself happened to be at Belleville in this way: I went to Belleville at the invitation of Mr. Mosty to meet Mr. McAnulty. McAnulty and Mosty were together that night, and went off together to Fort Worth; I believe they left together on the train; seemed to know each other. They invited me to be present that night at a business talk, but I did not go. This meeting was to be at the Manning hotel, kept by McAnulty's father-in-law. Mosty told me in September, 1881, that he and McAnulty had bought Bob Houston's, the defendant's, yearlings, to be delivered, I think, at Fort Worth, in the spring of 1882.

CROSS-EXAMINATION.

I know nothing of Mosty's financial standing except from my own dealings with him. I handled his checks for four or five years. These checks were handled as a part of my individual dealings with him. It was September 13th, 1881, when I met Mosty at Belleville. I know nothing more of the partnership between Mosty and McAnulty except what Mosty told me. I don't think he told me when the partnership commenced. He told me they had gone into the partnership some time before, and were in partnership then. My last dealings with Mosty was some time in May, 1881. In 1881 I sold about two

thousand head of cows, and cows and calves, for Mosty to other parties. I never bought any cattle from Mosty on my own account, nor for any one else.

Testimony of S. R. Walker, witness for the defendant: My name is S. R. Walker, sometimes called Rufe Walker. I live at Gonzales. I will be twenty-eight in December. I am a stock man. Bob Houston and I came to San Antonio together at the time the first memorandum contract between Buzard and Houston was made, and at that time Bob Houston and myself were very intimate, and I knew considerable of his business, and on the way up here he spoke of this Mosty cow trade, and said that he would have to sell those cows, or make his spring drive (meaning the spring of 1882) lighter than he wished; that he would rather sell the cows and make full drives, which he expected to do, if he could get a certain figure for them, which he specified, but I disremember the exact figure. After getting to San Antonio he met Buzard and made a trade with him to sell the bunch of cows. I was present and saw the outline of the contract drawn up, and five hundred dollars paid by Buzard to bind the trade, which was to be closed the Tuesday of the following week. The next day, I think it was, we went home, and Bob Houston was taken sick, and got me to come up on the Tuesday when the contract was to be closed and see Buzard and set a time for Houston to meet him. I came up on the day the contract was to be closed and met Buzard, and we set the time to be from the 12th to the 15th of November, and when Buzard got here on November 12th or 15th, whichever it might be, he was to telegraph to Houston. Then I returned home, and Houston, myself and several others came up to the fair at San Antonio a few days afterwards, and on our arrival here at night Bob Houston met Buzard. I saw Buzard and Houston to-

gether the next morning after our arrival; this was several days before the time fixed between Buzard and myself for their meeting, and it was the time that the trade between them was closed. This was a new trade, and a transfer of the Mosty contract, and the old trade was that Houston was selling this number of cows—the Mosty cows. I have been acquainted since the early part of last season, nearly two years, with Mosty. I never had any business with him. I met Mosty and McAnulty together at Bonham, in September or August, 1881. As far as my knowledge went, Mosty's financial standing in September, and up to October, was good. I did not hear of his failure until some time after the trade was closed between Buzard and Houston.

CROSS-EXAMINATION.

I know nothing about the matter of the new trade, except what Houston told me. I know that Buzard spoke about the trade being closed, but he did not speak to me of the nature of the new trade. Some stock men about Gonzales had dealings with Mosty. His financial standing seemed to be good at that time. If it had been doubted I should have known it, I think.

Testimony of Robert A. Houston, the defendant: I am thirty-three years of age. I am a cattle raiser. I reside in Gonzales, Texas. I was in San Antonio in October, 1881—some time between the 1st and 10th of the month—as near as I can remember. I met Maj. Hinkle while I was here and asked him if he knew of any one who wanted to buy some cows. He said he did. I told Hinkle if he met any one who wanted to buy the cattle to sell them for me—one thousand at Gonzales and fifteen hundred cows and bulls at Lampasas. During that evening I sold the Gonzales cattle to Tom Coleman and H. D.

Sullivan, to be not less than seven hundred nor more than one thousand head, for fifteen dollars a head. While we were fixing the contract with Sullivan after supper, Maj. Hinkle walked up with Buzard and introduced me to him, and said: "I have sold your cows to Capt. Buzard for fifteen dollars and fifty cents per head." I told him that it was all right; I was glad that he had sold them. Buzard paid me five hundred dollars then to bind the contract we were to enter into. I think we were to fix up the contract five or six days afterwards. At the time appointed to draw this contract I was quite sick, but sent S. R. Walker to San Antonio to meet Mr. Buzard and to tell Mr. Buzard why I could not get here, and to tell Mr. Buzard to appoint any time after a few days, and I would meet him at any time he might appoint. He sent me word to come to San Antonio and he would meet me here at any time between the 12th and 15th of November, 1881. I came up to the San Antonio fair on the 31st of October, and I met Mr. Buzard at Hord's hotel that night. I told him I was glad to meet him, as we could fix up our contract at this time, and it would save me another trip to San Antonio. He said he guessed we could arrange the matter at this time. We were talking at Hord's hotel after supper on the night of the 31st, and I asked him where we could meet the next morning and fix up that contract. He said we would get together at the hotel next morning and go somewhere and arrange it. I then said to him: "Mr. Buzard, I have got a proposition to make to you." I said: "If you will take this Mosty contract off my hands and release me entirely, I will deduct twenty-five cents a head off of each cow and bull." He said: "Where is your Mosty contract? let me see it." I handed it to him. He read it, and asked me where Mosty lived. I told him in Lampasas. I told

him that he ought to have known Mosty; that he was a large cattle dealer, and I had heard it said frequently that he handled more cattle in 1881 than any Texas man on the market. He handed me the contract back and said: "I will give you an answer in the morning." He came to me the next morning, November the 1st, and said: "I am ready to fix up the contract. Are you?" I said: "Yes sir." He said: "Come, let us go over to Hinkle's office." We sat down in Hinkle's office, and Buzard said: "Mr. Houston, let me see that contract again." He read it over twice, and asked if I would let the interest on the fifteen thousand dollars of the Mosty contract go with the twenty-five cents a head, and I said I would to close the trade. He said he did not like to make a contract of this kind much; he knew I was good for the amount of money he advanced, and Mosty he did not know anything about. I told him by paying me back the fifteen thousand dollars I had paid out, and releasing me entirely, and giving me his obligation for the difference, which was one dollar and a quarter a head, payable on the faithful performance of the contract, I would give him the contract—which he did.

He said he did not know if Mosty was good or not. I told him I considered him good, and I thought he was good for his contract; that he had made two contracts of the same kind with friends of mine in my county, and the parties had told me that Mr. Mosty was a gentleman, and had carried out the contracts with them perfectly.

He asked me who the parties were. I told him Bennett Brothers and Miller, Sayers and Kokernut. I told him I considered him as good as myself, as he had handled twice as many cattle in 1881 as I had. I told Buzard that Mosty had told me, as we were coming home

from Kansas together, that he was a partner of R. E. McAnulty in all their cattle dealings; that he said they were partners, but that the contract did not show they were partners, but Mosty had told me that they were partners. I told him the way that Mosty came to tell me they were partners was that we were talking about a herd of yearlings I had sold to McAnulty, amounting to about twenty-five hundred head. He told me that McAnulty had given me too much for the yearlings; that they were going to carry them west and grow them, and did not expect to put them on the market.

After he accepted the contract we went off to hunt a lawyer to write the contract. I told him we could get Judge Smith. We did so. Told him how we wanted the contract written. He wrote it. Buzard gave me a draft for the amount of money, and we separated. This was on the first day of November, 1881. The next time I saw Mr. Buzard was between the 16th and 20th of November, at Gonzales. He told me he was hunting me, that Mosty had broke, and he wished me to get that money for him. I told him that Mosty was the man that owed him the money, and to go to him. He remarked that he might just as well go after a wet dog; that he had been to Lampasas, and the property was all hid, smuggled, and he thought his best chance was to work on me. I told him I owed him nothing. He said somebody owed him, and he didn't propose to pay something for nothing. I asked him why he didn't come to me before he went to Mosty; if I owed him, why he went to Mosty. He said because he thought he would try Mosty, and if he could get it out of him he would do so. He said: "How about that partnership; Did you not tell me that McAnulty was a partner of Mosty's?" I told him no; that I had told him that Mosty had told me so coming down from Kansas

City on the train, and Buzard said he knew I had Mosty and McAnulty in partnership in some way, and he did not remember how it was. Mr. Henry Heath, a merchant of Gonzales, was present during this conversation. I had no further conversation with Buzard about the matter after this. He told me he would sue me to the extent of the law, as he was a lawyer himself. On November the 10th, 1881, I had an appointment to meet M. K. Wolf in Austin, and he told me in the presence of W. S. Carothers that he thought that Mosty was crippled financially. I asked him why he thought so, and he said a friend of his had informed him of a draft being protested. I had never heard of Mosty's insolvency before. Littlefield nor any one else had ever told me of Mosty's insolvency before this. I believed the statements I made to Buzard in regard to the financial standing of Mosty were true, and all other things I stated to him. The difference in the proposition I made to Buzard on October the 31st and the original agreement was twenty-five cents per head and the interest on the fifteen thousand dollars I had advanced to Mosty; the further difference that this was a transfer of the Mosty contract without recourse on me, and the original contract was one in which the same cattle had to be delivered by me. My reason for discounting the Buzard draft was that I was owing Mr. Dillworth between twelve and fifteen thousand dollars, and they discounted it at the same rate of interest I was paying Dillworth, and I took the money home and saved exchange. This enabled me to strengthen my credit with my banker, Dillworth, and to make additional purchases to carry out my business. I wanted money to make an advance to Porter and Newsome for about sixteen hundred yearlings. I never offered to sell the Mosty contract to any one but Buzard. I offered to sell Alonzo Millett the Mosty cows

and the Gonzales cows, and made the same offer to Tom and John Deweese to sell these cows; this was between October 1st and 10th, 1881.

Deweese offered me fourteen dollars a head, to be delivered at his ranch at Atascosa and Wilson counties, and Millett offered me the same, or less, and wanted them delivered in the fall of 1881, while my contract was for the spring delivery of 1882.

I never offered to sell the contract, without recourse, to any one except Buzard. The only reason given by Millett why he couldn't trade for the Mosty contract was that I couldn't deliver them in the fall, and he offered me less money than the cattle cost me.

CROSS-EXAMINATION.

When I left home to come to the fair I had no idea of closing the original contract at that time, because I had no idea I would then meet Buzard, as the arrangement had been made with Mr. Walker to meet me between the 12th and 15th of November, and this was the 31st of October. When I left home to come here I did not come to sell the Mosty contract; I came to attend the fair. I didn't expect to sell the Mosty contract on this trip to anybody, as I had sold the cattle to Buzard, and they were his cattle. The first contract I considered the sale of the Mosty cattle to Buzard, and I offered them to no one else. The Mosty cattle were the cattle of the first trade. I told him they were Lampasas cattle; those were the only cattle of that description I owned in Lampasas county. I got here between seven and eighi o'clock on the night of October the 31st, last. I don't know what time that day Buzard came here. I don't remember that he told me when he got here. I first made the proposition that night to close up the trade we had made. He

said we could do it, but the money he was to give me he had used for some other purpose, and could not put it up before fourteen or fifteen days, but if it would suit me he could give me a draft payable in fourteen or fifteen days. I did not state to him at this time that it made no difference to me, as I did not need the money just then, and I did not state this to him at any time. I told him if he gave me a draft payable in fourteen or fifteen days that it could be arranged in that way, and that we could go on with our contract. At the time I made this trade with him I do not remember of knowing that Buzard was fencing a pasture, and wanted the cattle for breeding purposes. I did not know at this time that Buzard had a partner, and I don't remember that I knew he had a partner at the time the contract was assigned; he did not tell me so, or anyone else, and I don't remember whether the contract shows it or not, or whether the draft shows it. Buzard and myself had completed our agreement, at Hinkle's office, before we went to get a lawyer to draw up the assignment. I don't remember whether there was or was not any change made after we left Hinkle's office. We were at Hinkle's office about ten or fifteen minutes.

Major Hinkle was there part of the time, and told Buzard that Mosty was good and solvent, and did most of the talking himself, and told Buzard he knew Mosty better than I did. Hinkle had a good deal to do with the trade, and advised Buzard to take the assignment. He introduced me to Buzard. I had never known Buzard before, and Hinkle said he had sold the cattle to Buzard before Buzard and I had spoken about the subject. This was in reference to the first contract. Hinkle was nobody's agent in the sale of these cattle that I know of. I told him if he could sell the cattle to do so. I told Hinkle after the sale was made I would give him a suit

of clothes; he came back and said he needed the money more than he did the clothes; I then paid him twenty-five dollars in money. I saw Hinkle on the night of October 31. 1881. I did not tell him on this night about my new proposition to Buzard. I heard him and Buzard speaking privately about it. I gave Hinkle twenty-five dollars for the first trade. I heard some of the conversation between Buzard and Hinkle. If Buzard had not accepted the transfer of the Mosty contract I was ready to close up the original contract on the morning of November 1st, and I told Buzard so. Our negotiations were not at an end concerning the first contract until Buzard agreed to accept the assignment of the Mosty contract and release me from the first contract. Buzard agreed to accept the transfer of the Mosty contract about nine o'clock of the morning of November the 1st. I don't remember whether Buzard agreed to accept the transfer of the Mosty contract before or after the conversation with Hinkle on the morning before referred to, in which Hinkle spoke concerning the solvency of Mosty. I did not tell Buzard before he agreed to accept the transfer of the Mosty contract that Mosty was as good or better than I was. I told him that he ought to be as good as anybody, from the number of cattle he claimed to have handled in 1881.

Question: Did you not tell Captain Buzard before he agreed to accept the assignment of the Mosty contract that you knew the Mosty contract would be filled, because Mosty then had twelve hundred—or the most of the cattle on his ranch or range in Lampasas county—in his ranch or rail brand?

Answer: I did not. I told Captain Buzard that Mosty would have to road brand the cattle for me in any brand that I might name; that this was my contract, and that he (Buzard) could have the same privilege, but that

Mosty told me there would be about twelve hundred of these cattle in his range or ranch brand which he called the rail brand. The rail brand of Mosty is a long bar running from the shoulder towards the flank, from a foot to two feet long, and I knew this to be his brand from cattle which I had seen delivered by him in Kansas and in Gonzales county, and he (Mosty) told me it was his brand.

Question: Did you not tell Captain Buzard before he agreed to accept the assignment of the Mosty contract that you knew the contract would be filled, because R. E. McAnulty was a partner with Mosty in this contract; that you knew R. E. McAnulty was such partner in this contract, because R. E. McAnulty had told you he was a partner with Mosty in this contract?

Answer: No, I never did; though I heard Buzard swear the other day that I did. I said to him, as I stated before, that Mosty had told me, coming from Kansas City to Denison, in August, 1881, that he and McAnulty were partners in the cattle business, also in twenty-five hundred yearlings I had sold to McAnulty to be delivered in May, 1882.

Question: Did you at any time tell Captain Buzard what is embodied in the foregoing questions?

Answer: I never did.

Question: Did not Captain Buzard demand when he came to Gonzales to see you that you should pay back to him the fifteen thousand dollars he had paid to you?

Answer: He did, and I told him Mosty owed him the money, I did not, and to go to him. He said he had been to Mosty and could get nothing, and he thought he could work on me.

Question: Did not Capt. Buzard, on the morning of the 1st day of November, 1881, refuse to accept an assignment of the Mosty contract unless you would guarantee the fulfilment of it; and did you not, upon that refusal, state that the reason why you wished to assign the contract instead of completing the one already under negotiation was because at that time (that is, between May 1st and 10th, 1882) you would be employed in other transactions, and could not well attend to the completion of the said contract by said Mosty, and that it would be a useless thing for you to attend to the delivery of the cattle by Mosty?

Answer: Buzard did not refuse to accept an assignment of the Mosty contract unless I would guarantee the fulfilment of it; but accepted it, and said he would accept it if I would give him the interest on the fifteen thousand dollars that Mosty would owe me. I told him that I would be busy receiving and branding cattle about that time in Gonzales county, and it would suit me to get him to take this contract, and that I would deduct the twenty-five cents per head on the previous contract if that suited him; if not, I would go on with the first contract; and he said if I would give him the interest he would do it. It would have cost me about this amount to have gone and received the cattle, but I did not so tell Buzard that I remember of. I did not tell Buzard that I could not well attend to the completion of the contract by Mosty, and that it would be a useless thing for me to attend to the delivery of the cattle by Mosty and then hand them immediately over to Buzard and Hillard.

Question: Did not Capt. Buzard state at the time he accepted this contract that he (Buzard) knew nothing of the solvency of Mosty, but that he would take your word for it; and also take your word that McAnulty was a

partner with Mosty in this contract; and take an assignment of this contract to accommodate you and save you the trouble of going up there to receive the cattle?

Answer: Buzard did not say at the the time he accepted this transfer that he knew nothing of the solvency of Mosty, and would accept my word for it. No such conversation passed between Buzard and myself that he would take my word that McAnulty was a partner with Mosty in this contract, and it could not have happened, because I never told Buzard that McAnulty was a partner with Mosty in this contract. I told him that Mosty had told me he was a partner with McAnulty in the cattle business, but I did not tell him that Mosty had said he was a partner in this contract. Buzard did not tell me that he would take an assignment of this contract to accommodate me and save me the trouble of going up there to receive the cattle. I paid him for all the accommodation he did for me. Buzard and myself held our conversation in Gonzales in front of Heath's store, sitting on a ladder, and Heath was standing in the door about five feet from us, and heard the conversation. I think we met at the bank. We had all our conversation about the matter in front of Heath's store.

RE-DIRECT EXAMINATION.

Witness identified the following paper and attached it as Exhibit "D."

SAN ANTONIO, TEX., Nov. 1st, 1881.

This is to witness that we this day become the assignees of Mr. R. A. Houston, of all his rights under and by virtue of a contract for the delivery of cattle between him and L. A. Mosty for the consideration of fifteen thonsand dollars paid down, and for the further sum of eighteen hundred and thirty-seven dollars and fifty cents, to

be paid by us to R. A. Houston upon the final delivery to us of the cattle by the said Mosty, under the said contract between R. A. Houston and Mosty.

BUZARD & HILLARD.
R. A. HOUSTON.

Testimony of Henry Heath, witness for the defendant:

I live in the town of Gonzales. Have lived there from 1879 until August, 1882; have followed the occupation of grocery merchant and saloon keeper; I kept house and lived with my family; I never was employed for anyone but for myself; I never lived with the defendant; I am now clerking for J. C. Carter, keeping house, and living with my family.

It was my custom when not busy to stand in front of my house, and the remark of Buzard drew my attention to the conversation. I was standing in my north-east front door, about seven or eight feet from Messrs. Buzard and Houston, and they were sitting on a pair of skids at the north-east corner of my store, to my right; they were talking in an ordinary tone of voice; they were not angry with each other. I was not invited by either of the gentlemen to hear what they had to say; all that I heard I heard as I have stated. I think it was in the month of November, 1881; do not remember the day of the month; the first that attracted my attention to them was a remark made by Mr. Buzard to Mr. Houston that he had paid his money for something that had no value, and R. A. Houston replied that he was as ignorant of that fact as he (Buzard) was. Mr. Buzard made some remark which I did not understand. Mr. Houston then remarked, which I supposed to be a reply to Mr. Buzard, that he came down on the train with L. A. Mosty from Kansas City in August, 1881, "and he (Mosty) told me that he and R. A. McAnulty were partners; that is what I told you."

Buzard then remarked: "Yes, you said something of the kind." About that time I was called in the store and heard no more of the conversation.

I do not know of any one being present during the conversation between Mr. Buzard and R. A. Houston. At a later hour on the same day the conversation occurred between Mr. Buzard and R. A. Houston, I met Mr. Houston in the back room of my store in company with several other gentlemen, and asked him what was the matter with him and the gentleman he was talking to outside; he then told me the gentleman's name was Mr. Buzard. I then and there told him that I heard part of the conversation that I have stated.

I was at my place of business, and the conversation I heard was so short, and being so close to my business that it was impossible for me not to have heard the conversation, and I am not aware of breaking the rules of etiquette.

Mr. Buzard was a stranger to me, and it was none of my business to overhear what he had to say to Mr. Houston or any one else.

Testimony of J. H. Stevens, witness for the defendant: My name is J. H. Stevens; am fifty-three years of age; am a cattle trader and raiser by occupation; reside in Goliad, Goliad county, Texas.

I know all the parties to this suit personally. I have known Mr. Mosty but a short time; I think I made his acquaintance during the year 1881; have known McAnulty longer, several years; can't state the exact time I made his acquaintance.

I know nothing of any partnership existing between McAnulty and Mosty in the cattle business during the summer and fall of 1881.

I know nothing of a contract between McAnulty and Mosty, or between Mosty and Houston, in regard to a partnership as before stated, and all that I do know about this business is as follows: In the store house of Wright, Beverly & Company, in Dodge City, Kansas, about the time the contract between Mosty and Houston was said to have been made, R. E. McAnulty said to me, "It is my money that is furnishing those cows, but Bob does not know it." I understood this statement to refer to the contract between Houston and Mosty, because Houston and McAnulty had just had a conversation in reference to that contract, which I heard, and this remark was made just after Houston left the house.

I have stated everything that I know about a contract between Mosty and Houston in my foregoing answer.

I have stated all that I know fully.

CROSS-EXAMINATION.

I reside in Goliad county. I am in Gonzales county at present, for the purpose of attending a meeting of Gonzales commandery, No. 11, of which I am a member, and I am not likely to be in Goliad soon is the only reason I know of why my depositions are being taken in Gonzales. The H. stands for Henry in my name, and I am the person usually called by my friends Uncle Henry. I knew McAnulty and Mosty in Dodge City. They were known as cattle men, and Mr. Mosty was then trading in cattle. I was a cattle man and was at that time trading in cattle. I made no trades with either of them. No more intimate relations existed between them, or either of them, and myself than generally exist between cattle men assembled at the headquarters of cattle men. I knew them in Dodge City, Kansas.

I have never said there was any contract of partnership between McAnulty and Mosty. The only knowledge I have about the whole matter was stated in my answer to direct fifth interrogatory. The conversation to which I referred occurred in Dodge City, Kansas, in the store house of Wright, Beverly & Company. McAnulty and myself were present. Mosty was not present; don't remember who else was present. What was said and how it came to be said was stated in my answer to direct fifth interrogatory, to which I refer. I have no interest whatever in the matter.

I know nothing of the contract between Mosty and Houston, and had no interest whatever in it.

I had no interest in it and did not care to know anything about it.

All the knowledge I have of this matter was received from Mr. McAnulty, and which was set out in my answer to fifth direct interrogatory, to which I refer; I had no letter or writing from anyone; can't state the precise date it occurred in the year 1881, a few days after the contract between Mosty and Houston was said to have been made.

I am sure R. E. McAnulty made the statement to me at the time and place as set out in my answer.

I have not had any conversation with Houston or Mosty at any time concerning this matter. I have had but the one conversation with Mr. McAnulty, and that occurred a short time after the contract between Mosty and Houston was said to have been made. I have no relation with the defendant at present. I bought cattle from him in 1881; I have answered why I came to Gonzales to answer the deposition already; I am not here at the instance of the defendant; I am stopping at the residence of my relation, L. H. Plank, at my own expense.

I have had no communication with the defendant, except to tell him what I would testify in the case.

The above is all the evidence that was introduced on the hearing of this case, by the complainants and the defendant.

The Bill of Complaint, the "further answer of the defendant, and the plaintiffs' replication" had been previously read to the Court.

11937

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No. 27.

# In the Supreme Court of the United States.

OCTOBER TERM, 1886.

BENJAMIN F. BUZARD and MOSES HILLARD,
*Appellants,*

*against*

ROBERT A. HOUSTON,
*Appellee.*

## Supplemental Brief of Appellants.

H. E. BARNARD,
*Of Counsel for Appellants.*

# UNITED STATES OF AMERICA.

No. 27.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

BENJAMIN F. BUZARD and MOSES HILLARD,
Appellants,

*vs.*

ROBERT A. HOUSTON,
Appellee.

## Supplemental Brief of Appellants.

Assignment of the grounds of error in the decree.

1st. The allegations contained in the bill of constructive fraud practiced by the appellee upon appellants were fully sustained by the testimony introduced by the appellants, and the decree rendered herein is erroneous, in this that it is not supported by the testimony and is contrary to the testimony and contrary to equity.

2d. The bill sets forth that the appellants were solely induced to accept an assignment of the Mosty contract in lieu of the fulfillment of the memorandum contract between appellants and the appellee, solely by reason of the representations of the appellee at the time made by him to the appellants, which representations of appellee to them made were in fact untrue; and the testimony introduced upon the hearing of this cause in the court of first instance, amply supported the foregoing allegations and established a clear case of constructive fraud as alleged in the bill, and notwithstanding such allegations and proof, the Court rendered a decree in this cause in favor of the appellee, which decree is erroneous, in this that the same is contrary to the allegations and proof, and is entirely unsupported by the testimony and contrary to equity.

H. E. BARNARD,
Of Counsel for Appellants.

2d. The bill sets forth that the appellants were solely induced to accept an assignment of the Mosty contract in lieu of the fulfillment of the memorandum contract between appellants and the appellee, solely by reason of the representations of the appellee at the time made by him to the appellants, which representations of appellee to them made were in fact untrue; and the testimony introduced upon the hearing of this cause in the court of first instance, amply supported the foregoing allegations and established a clear case of constructive fraud as alleged in the bill, and notwithstanding such allegations and proof, the Court rendered a decree in this cause in favor of the appellee, which decree is erroneous, in this that the same is contrary to the allegations and proof, and is entirely unsupported by the testimony and contrary to equity.

H. E. BARNARD,
Of Counsel for Appellants.

119-347

Office Supreme Court U. S.
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# Supreme Court of the United States.

OCTOBER TERM, 1885.—No. 264.

BENJAMIN F. BUZARD and MOSES HILLARD, appellants,

*vs.*

ROBERT A. HOUSTON.

Appeal from the Circuit Court of the United States for the Western District of Texas.

## BRIEF OF APPELLEE.

**JAMES F. MILLER,**
*Solicitor for Appellee.*

GRAY & CLARKSON, PRS.

# Supreme Court of the United States.

OCTOBER TERM, 1885.—No. 264.

BENJAMIN F. BUZARD and MOSES HILLARD, appellants,

*vs.*

ROBERT A. HOUSTON.

Appeal from the Circuit Court of the United States for the Western District of Texas.

## STATEMENT OF THE CASE.

This bill was filed by appellants (complainants below) to cancel and annul an assignment, by the defendant to them, of a contract for sale and delivery of cattle, executed for benefit of defendant, by one L. A. Mosty, on August 13, 1881. The said assignment being made and executed by the defendant in consummation of, or in substitution for, a written agreement for a formal contract for sale by the defendant of certain cattle.

The following is a history of the transactions out of which the controversy arose:

The complainants were co-partners engaged in raising cattle in Texas. In October, 1881, the complainant, Buzard, went to San Antonio to purchase cattle to

stock their ranche, situated in Zavalla county. He was introduced by one D. W. Hinkle to the defendant. Thereupon the said complainant, Buzard, and the defendant entered into negotiations and executed the following agreement:

"SAN ANTONIO, TEXAS, *October* 14, 1881.

Received this day of B. F. Buzard five hundred dollars in part payment for fifteen hundred head of cattle, cows and bulls, to be contracted for next Tuesday, on which Mr. Buzard agrees to advance 50 per cent. of the price, which is to be fifteen dollars and fifty cents per head.

R. A. Houston agrees to make the contract at the time specified, cattle to be delivered at Lampasas, Texas, between the first and the 10th of May, 1882.

If the cattle are not delivered R. A. Houston agrees to forfeit to B. F. Buzard fifteen hundred dollars if the contract is not filled. B. F. Buzard binds himself to take two thousand cows at the same figures, and to forfeit fifteen hundred dollars if he fails to comply with the contract."

R. A. HOUSTON,
B. F. BUZARD.

Witnesses:
D. W. HINKLE.
J. H. PRESNALL.

On the day fixed for completion of the contract Houston was confined to his bed, but he sent one S. R. Walker to report his inability to attend, and to arrange another day for the meeting. Buzard and Walker were unable to agree upon a particular date, but it was agreed that it should be between the 12th and 15th of November, and that Buzard would telegraph defendant on his arrival at San Antonio.

On October 31, 1881, Houston and Buzard were both in San Antonio, both arriving late in the evening. They casually met at the Hord Hotel and agreed to settle the transaction. Thereupon, Houston proposed to Buzard that as a consummation of the contract mentioned in the memorandum of October 14, in the custody of D. W. Hinkle, he, the said Buzard, should take from defendant an assignment of a contract which defendant had made with one L. A. Mosty, which contract was as follows:

"DODGE CITY, FORD COUNTY, KAN., *August* 13, 1881.

Contract entered into this day at Dodge City, Kans., by and between L. A. Mosty, party of the first part, and R. A. Houston, party of the second part, to wit: That L. A. Mosty, party of the first part, hereby agrees to sell and deliver unto R. A. Houston, party of the second part, fifteen hundred dry cows at fourteen dollars per head, same to be good, smooth, and merchantable cows, and to range from (3) three to (8) eight years old; and, furthermore, L. A. Mosty, party of the first part, agrees to brand said cows with road brand of R. A. Houston, party of the second part, and to deliver said cows at a point six miles west of Lampasas, Texas. Also L. A. Mosty agrees to deliver and sell to R. A. Houston fifty (50) bulls at ($14.00) fourteen dollars each, said bulls to be from (3) three to (5) five years old, straight and smooth.

L. A. Mosty, party of the first part, acknowledges receipt of fifteen hundred ($1,500) dollars from R. A. Houston, party of the second part, as part payment on herein-mentioned cattle.

Furthermore, R. A. Houston, party of the second part, hereby agrees to honor the drafts which may be drawn by L. A. Mosty, party of the first part, to the amount of thirteen thousand five hundred ($13,500) dollars, interest to be computed at the rate of 10 per cent. per

annum. L. A. Mosty, party of the first part, hereby agrees to deliver said cattle between the first and 15th day of May, 1882.

It is further agreed that the balance due on said cattle shall be paid upon their delivery. In case of failure of L. A. Mosty, party of the first part, to comply with the above conditions and agreement between him and R. A. Houston, L. A. Mosty hereby agrees to forfeit the sum of fifteen hundred ($1,500) dollars, same to be paid over to R. A. Houston, party of the second part."

L. A. MOSTY.
R. A. HOUSTON.

Witnesses:
J. W. ORMOND.
R. M. WRIGHT.

"At the bottom of the first page of said contract the following note is written (note interlined at No. 7, at fourteen dollars per head), and opposite 3d line, 2d page, the word cattle is written."

The defendant required, in case of the acceptance of the assignment of the contract, that Buzard should pay him the sum of $15,000, which had been by him advanced to Mosty; that he should assume the balance to become due on delivery of the cattle, and should pay him an amount equal to the difference between the price he had contracted to pay Mosty and the price Buzard had agreed to pay for cattle under the memorandum agreement of October 14, 1881.

Buzard, after carefully perusing the Mosty contract, asked until the next morning to consider it, and agreed to meet defendant at the office of D. W. Hinkle and give a final answer.

Pursuant to this agreement, the parties met in the office of the said Hinkle the following morning, and,

after again reading over the Mosty contract, agreed to accept an assignment of the same on the terms offered if the defendant would guarantee its performance. This the defendant refused to do, and he then proposed instead of said guarantee to abate twenty-five cents per head off the cattle. Buzard said if defendant will let the interest on the $15,000 on the Mosty contract go with the twenty-five cents per head he would accept the assignment. Defendant agreed to this, and the parties went off to hunt a lawyer to write a contract of assignment, which is as follows:

"STATE OF TEXAS, *County of Bexar:*

Know all men by these presents, that I, Robert A. Houston, party of the second part to above and foregoing contract, for and in the consideration of the sum of fifteen thousand dollars, to me in hand paid by Buzard and Hillard, (being the sum advanced by myself, R. A. Houston, in payment on the said contract,) and the further sum of $1,837.50, eighteen hundred and thirty-seven dollars and fifty cents, due upon completion of the foregoing contract, do this day transfer and assign unto said Buzard and Hillard all the right, title, and interest which I have by virtue of said foregoing contract it being understood that no responsibility shall rest upon me in the event the L. A. Mosty, party of the first part in said contract, fails to comply in any respect with the terms thereof.

In witness hereof, I hereunto sign my name this 1st day of November, A. D. 1881."

R. A. HOUSTON.

Witnessed by—
F. G. SMITH.
J. F. LACOSTE.

Duplicate witnessed by R. E. McAnulty, E. C. Colley, J. W. Ormond (in pencil.)

Prior to leaving Hinkle's office, and after the acceptance of the assignment, the memorandum contract of October 14, 1881, was delivered to the defendant by Hinkle.

After the assignment had been consummated, Buzard executed and delivered to defendant the following paper:

EXHIBIHT "D."

"SAN ANTONIO, TEX., *November 1st*, 1881.

This is to witness that we this day become the assignee of Mr. R. A. Houston, of all his rights under and by virtue of a contract for delivery of cattle between him and L. A. Mosty for the consideration of $15,000.00 paid down, and the further sum of eighteen hundred and thirty-seven dollars and fifty cents, to be paid by us to R. A. Houston upon the final delivery to us of the cattle by said Mosty under the said contract between R. A. Houston and Mosty."

BUZARD & HILLARD.

In the early part of November, 1881, the complainant, Buzard, learned of Mosty's insolvency, and then shortly after filed the bill.

## ISSUES OF FACT.

The complainant avers and contends that the defendant represented to the said Buzard that the said Mosty was good and solvent and able to perform his said contract; that he was better than the defendant, and that the said Mosty at that time had 1,200 head of the cattle in the rail or ranche brand of said Mosty; that there was no doubt of the performance of the said contract, as R. E. McAnulty was a partner with the said Mosty *in the performance of the same.* (Record p. 4, par. 9.)

That these allegations were deceitful and fraudulent, and that they were intended by the said defendant to deceive. (Record p. 7, par. 18.)

They aver that the representations aforesaid made by the defendant to Buzard constituted the inducement for the said Buzard to deliver up the memorandum of the contract and accept the assignment in lieu thereof. (Record p. 6, par. 16.)

They further aver that they believe and charge that the defendant, at the time he assigned the contract, well knew of the insolvency of the said Mosty, or had good reason to believe that he was in failing circumstances. (Record p. 9, par. 22.)

The defendant in his answer denies that he at any time made any representation to said Buzard to the transfer of said contract with said Mosty, or as to the ability of said Mosty to perform said contract which he knew to be untrue, and that he did not make any statements to said Buzard in reference thereto which he (defendant) did not believe to be true. He denies that he represented to said Buzard or stated as a fact, within knowledge of defendant, that L. A. Mosty was as good or better than defendant; that L. A. Mosty was solvent and able to perform his contract, or that said Mosty had 1,200 head of cattle on his rail or ranche brand, or that R. E. McAnulty was a partner of said Mosty and bound upon his (Mosty's) contracts. He admits that he said, at some time during the negotiation *that he believed* the said Mosty to be good and solvent and able to perform his contract; that it was generally understood that said Mosty had handled over 30,000 head of cattle during the season of 1880, and that was more cattle than he (defendant) had ever been able to handle.

He further admits that he told said Buzard that,

coming down from Kansas City to Texas, said Mosty had told defendant that R. E. McAnulty was a partner with him in his cattle contract. (Record p. 16, pars. 41 and 42.)

The defendant avers that it was generally understood in Gonzales county, where defendant resided, that said Mosty was a large dealer in cattle and perfectly good for his contracts, and as evidence of this defendant and others of his friends and acquaintances had advanced to said Mosty large sums of money upon contracts for future delivery of cattle, requiring no security for the same.

That it was not known to defendant at the time he transferred the contract to said complainants, nor was it known to any one of whom defendant might have acquired the information that said Mosty was not in a condition to perform his contract with defendant. (Record p. 17, par. 44.)

He further avers that all the means and source of information open to him were also open to said complainants for information in regard to the solvency of said Mosty. (Record p. 17, par. 45.)

He further avers that he was informed and believed that the statement made by said Mosty, that said McAnulty was a partner of said Mosty, was in fact true, and that said McAnulty was in truth and in fact a partner of said Mosty in his cattle contracts and was bound as a party upon the said Mosty's contract with him (defendant). (Record p. 17, par. 45.)

The complainants in support of their allegations produce first the deposition of B. F. Buzard in which he states: "When Houston made this proposition on the morning of November 1st, I objected to taking an assignment of the Mosty contract for the reason that I did not know Mosty or his financial standing. Houston

assured me that Mosty was good and solvent and able to fill the contract, and that R. E. McAnulty was the partner of Mosty, and that he also was good. He said that McAnulty was Mosty's partner in this contract. I then said to Mr. Houston that I did not know if Mosty was good or not, but that I knew that he (Houston) was and that if the representations were as he made them I would take his word for it, and take the assignment of the Mosty contract instead of the contract we had agreed on.

Buzard in cross-examination continues:

I stated yesterday that I knew McAnulty was solvent. I knew this from his general reputation and standing among cattle men, that his reputation was number one, good. *Cattle men know in a general way the financial standing of each other.* (Record p. 55, par. 143.)

Alonzo Millett was then produced by the complainant. He said I know R. A. Houston. I saw him about the middle of October, 1881, during the fair week in San Antonio at the Hord Hotel. Houston asked me if I was buying cattle, and I told him I was. He then told me he had some cows to sell. I asked him where they were. He told me that one lot of about 1,500 was about Lampasas. * * * I then asked him who was to deliver the cattle at Lampasas. He told me Lee Mosty. I then told him that trade would not be filled, and we would not talk trade about that lot. He says (speaking of Mosty) I had my suspicions aroused. I had met Captain Littlefield here four or five days, I think, prior to meeting Houston, who had told me that he had advanced Mosty $10,000 to buy cattle, for which he did not have a scratch of a pen, for he considered it as good as lost. I also met Mr. Towers at Denison who

had also made an advance of money to Mosty and had been looking him up to recover his money. (Record p. 61, pars. 159, 160, 161.)

D. W. Hinkle was then produced by the complainants. After speaking of the memorandum contract, he testifies as follows:

The next day Houston failed to put in appearance as he had agreed to in the memorandum contract, and he (Houston) was absent for some ten days or two weeks. At the end of that time, ten days or two weeks, Houston asked me to get Buzard to let him off from the contract and take his original contract with Mosty in lieu of it. As Captain Buzard was present or in the city I got him and Houston together, and Houston told him that as his business would prevent his giving his personal attention to the delivery of the cattle he would deduct twenty-five cents a head if Buzard would substitute Mosty's contract in place of his. Buzard asked me if Mosty's contract with Houston was good. Houston answered, he being present, that R. E. McAnulty was a partner to the contract, and that most of the cattle were gathered and then in the rail-brand in Lampasas county. Based on that statement, I advised Buzard to take it. Mr. Houston then paid me my commission, and I had nothing further to do with it. Houston told me that McAnulty had told him himself that he was a partner of Mosty. Houston said that Mosty was as good financially as he was. All this conversation occurred in the presence of Captain Buzard. Captain Buzard said he didn't know anything about Mosty; that he knew Houston was good, and told Houston he only made the transfer to accommodate him (Houston). Buzard told Houston that he transferred that contract, relying on Houston's statement that both McAnulty and Mosty were interested in the contract and were

perfectly responsible. Buzard was to relieve Houston of the trouble of going up there and take Mosty's contract—I mean an assignment of it—in lieu of Houston's contract, for which Houston paid him twenty-five cents a head. I was acting as agent for Houston in the sale of the cattle.

Buzard asked me concerning the solvency of Mosty at the time of the interview with Houston, and just before. When the inquiry was made by Buzard about the solvency of Mosty, when Houston was present, Houston answered it. After the answer of Houston to this inquiry, I told Buzard that if R. E. McAnulty was a partner of Mosty it made the Mosty contract as good as the bank, and I then advised him to take the transfer. He had declined to take the transfer of the Mosty contract in place of the other up to this time.

Buzard stated that, as he didn't know Mosty, he would have to rely on our joint statements that Houston's contract with Mosty was good, and, relying on that statement he had would make the transfer. They then left my office together, and I never saw the transfer they drew up until some time after. I kept the memorandum contract in my possession from the minute it was drawn up until this transfer was made. I did not know the financial standing of L. A. Mosty at that time. My opportunities at that time of knowing the financial condition of cattle men generally was perhaps better than any man in the State. I had a considerable knowledge of Texas cattle men generally. (Record p. 63, par 166.)

This is all the testimony produced by the complainants to prove the representations alleged to have been made by Houston to Buzard to bring home and establish upon Houston a knowledge of the falsity of the representations at the time they were made.

To rebut this testimony, the defendant introduced the following evidence:

Deposition of the defendant, Robert A. Houston, who testifies as to the assignment as follows:

I came up to the San Antonio fair on the 31st of October, and I met Mr. Buzard at Hord's Hotel that night. I told him I was glad to meet him, as we could fix up our contract at this time, and it would save me another trip to San Antonio. He said he guessed we could arrange the matter at this time. We were talking at Hord's Hotel after supper on the night of the 31st, and I asked him where we should meet the next morning to fix up that contract. He said we would get together at the hotel next morning and go somewhere and arrange it. I then said to him: Mr. Buzard, I have got a proposition to make you. I said: If you will take this Mosty contract off of my hands and release me entirely I will deduct twenty-five cents a head off of each cow and bull. He said: Where is your Mosty contract? let me see it. I handed it to him. He read it, and he asked me where Mosty lived. I told him in Lampasas. I told him that he ought to have known Mosty; that he was a large cattle dealer, and I had heard it said frequently he handled more cattle in 1881 than any Texas man on the market. He handed me the contract back, and said: I will give you an answer in the morning. (Record p. 85, par. 226.)

He came to me the next morning, November 1st, about 9 o'clock, and said: I am ready to fix up the contract; are you? I said: Yes, sir. He said: Come, let us go over to Hinkle's office. We sat down in Hinkle's office, and Buzard said: Mr. Houston, let me see that contract again. He read it over twice, and said if I would let the interest on the fifteen thousand dollars on the Mosty contract go with the twenty-five cents per head, and I

said I would to close the trade. He said he did not like to make a trade of that kind much; he knew I was good for the amount of money he had to advance, and Mosty he did not know anything about. I told him by paying me back the fifteen thousand dollars I had paid out, and releasing me entirely, and giving me his obligation for the difference, which was one dollar and a quarter a head, payable on the faithful compliance of the contract, I would give him the contract, which he did.

He said he did not know if Mosty was good or not. I told him I considered him good; that I thought he was good for his contracts; that he had made two contracts of the same kind with friends of mine in my county, and the parties had told me that Mr. Mosty was a gentleman, and had carried out the contracts with them perfectly.

He asked me who the parties were. I told him Bennett Bros. and Miller, Sayers and Kokernut. I told him I considered him as good as myself, as he had handled twice as many cattle in 1881 as I had. I told Buzard that Mosty had told me, as we were coming from Kansas together, that he was a partner of R. E. McAnulty in all their cattle dealings; that he said they were partners, but the contract did not show they were partners, but Mosty had told me they were partners. I told him the way that Mosty came to tell me they were partners was that we were talking about a herd of yearlings I had sold to McAnulty, amounting to 2,500 head. (Record p. 86, pars. 227 and 228.)

He told me that McAnulty had given me too much for the yearlings; that they were going to carry them West and grow them, and did not expect to put them on the market. After he had accepted the contract we went off to hunt a lawyer to write the contract. I

told him we could get Judge Smith. We did so. Told him how we wanted the contract written. He wrote it. Buzard gave me a draft for the amount of money and we separated.

Houston continues: The next time I saw Mr. Buzard was between the 16th and 20th of November, 1881, at Gonzales. He told me he was hunting me; that Mosty had broke, and he wished me to get that money for him. I told him that Mosty was the man that owed him the money, to go after him. He remarked that he might just as well go after a wet dog; that he had been to Lampasas, and the property was all hid, smuggled, and he thought his best chance was to work on me. I told him I owed him nothing. He said somebody owed him, and he did not propose to pay something for nothing. I asked why he did not come to me before he went to Mosty; if I owed him, why he went to Mosty. He said because he would try Mosty and if he could get it out of him he would do so. He said: How about that partnership? Did you not tell me that McAnulty was a partner of Mosty? I told him no, that I had told him that Mosty had told me so coming down from Kansas City on the train, *and Buzard said he knew I had Mosty and McAnulty in partnership in some way, and he did not remember how it was.* Mr. Henry Heath, a merchant of Gonzales, was present during this conversation. I had no further conversation with Mr. Buzard about the matter after this. He told me he would sue me to the extent of the law, as he was a lawyer himself. On November 10, 1881, I had an appointment to meet M. K. Wolfe in Austin, and he told me in presence of W. S. Carothers that he thought that Mosty was crippled financially. I asked him why he thought so, and he said that a friend of his had informed him of a draft being protested. *I had never heard*

*of Mosty's insolvency before.* Littlefield nor any one else had ever told me of Mosty's insolvency before this. I believe the statement I made to Buzard regarding the financial standing of Mosty to be true, and all other things I stated to him. (Record p. 87, par. 230.)

Houston, on cross-examination as to the conversation in Hinkle's office, in reference to the assignment, testifies:

Major Hinkle was there a part of the time, and told Buzard that Mosty was good and solvent, and did most of the talking himself, and told Buzard that he knew Mosty better than I did. Hinkle had a good deal to do with the trade, and advised Buzard to take the assignment. He introduced me to Buzard. I had never known Buzard before, and Hinkle said he had sold the cattle to Buzard before Buzard and I spoke about the subject. This was in reference to the first contract. Hinkle was nobody's agent in the sale of these cattle that I know of. I told him if he could sell the cattle to do so. I told Hinkle after the sale was made that I would give him a suit of clothes, and he came back and said he needed the money more than he did the clothes, and I then paid him twenty-five dollars in money. I saw Hinkle on the night of October 31, 1881. I did not tell him on this night about my new proposition to Buzard. I heard him and Buzard speaking privately about it. * * * I did not tell Buzard before he agreed to accept the transfer of the Mosty contract that Mosty was as good or better than I was. I told him that he ought to be as good as anybody, from the number of cattle he claimed to have handled in 1881. (Record p. 88, par. 235.)

Buzard did not refuse to accept an assignment of the Mosty contract unless I would guarantee the fulfillment of it, but accepted it, and said he would accept it if I

would give him the interest on the $15,000 that Mosty would owe. (Record p. 90, par. 240.)

G. N. Dilworth, a witness for defendant, speaking of the financial condition of Mosty, says:

I knew nothing of Mosty's financial condition about November 1st or 2d, except I believed him to be good. I knew nothing to the contrary until some time about the last of November. I gave Houston advice how to transfer the Mosty contract. I advised him to transfer it without recourse, and he remarked that he did not know how it ought to be done. I told him to get a lawyer to draw up the transfer. I told him if, in the spring, there should be any trouble about the number of cattle or their delivery, he would have to go up there and see about it if he sold the contract and guaranteed. This conversation took place a day or two before the transfer to complainants. (Record p. 81, par. 215.)

Continuing he says:

At the time I gave Houston the advice to transfer the Mosty contract I had no knowledge of Mosty's insolvency, and heard no remarks to that effect, and no suspicion that he was insolvent. (Par. 216.)

This same witness, on re-examination, says:

Mosty's general financial reputation was that of a solvent responsible man up to the latter part of October or first of November, 1881.

L. G. Robinson, a witness for the defendant, in reference to the partnership between Mosty and McAnulty, says:

Mosty told me in September, 1881, that he and McAnulty had bought Bob Houston's, the defendant's yearlings, to be delivered, I think, at Fort Worth, in the spring of 1882. (Record p. 83, par. 219.)

On cross-examination: I know nothing of Mosty's financial standing except from my own dealings with

him. I had handled his checks for four or five years. These checks were handled as a part of my individual dealings with him. It was September 13th, 1881, when I met Mosty at Bellville. I know nothing more of the partnership between Mosty & McAnulty except what Mosty told me. I don't think he told me when the partnership commenced. He told me they had gone into a partnership some time before, and were in partnership then. My last dealings with Mosty was some time in May, 1881. In 1881 I sold about two thousand head of cows, and cows and calves for L. A. Mosty to other parties. I never bought any cattle from Mosty on my own account, nor for any one else. (Record p. 83, par. 220.)

S. R. Walker, a witness for the defendant, testifies in reference to the solvency of Mosty: As far as my knowledge went, Mosty's financial standing in September, and up to October, was good. I did not hear of his failure until some time after the trade was closed between Buzard and Houston.

On cross-examination, in reference to Mosty's financial standing: If it had been doubted I should have known it, I think. (Record p. 84, par. 223.)

Henry Heath, a witness for the defendant, was asked the following questions:

First. If you have stated, in answer to the last interrogatory, that you lived in the town of Gonzales, in November, 1881, then please state whether during that month you were present at or overheard a conversation between Capt. Buzard, one of the plaintiffs in this case, and Robert A. Houston? (Record p. 92, par. 245.)

And answered:

First. I heard a conversation between Capt. Buzard and R. A. Houston. (Record p. 96, par. 255.)

Q. If you say you were present at or overheard such

a conversation, then please state, as near as you can remember, the day of the month when the same took place, and what each party said. State particularly whether in that conversation anything and what was said by the parties in relation to a partnership between R. E. McAnulty and L. A. Mosty; what question or questions were asked by Capt. Buzard, and what answer or answers were given by Houston, relative to said partnership. State all that was said by both Capt. Buzard and Mr. Houston? (Record p. 92, par. 246.)

A. I think it was in the month of November, 1881; do not remember day of month. The first that attracted my attention to them was a remark made by Mr. Buzard to R. A. Houston, that he had paid his money for something that had no value, and R. A. Houston replied that he was as ignorant of that fact as he (Buzard) was. Mr. Buzard made some remark which I did not understand. Mr. Houston then remarked, which I supposed to be a reply to Mr. Buzard, that he came down on the train with Mr. L. A. Mosty from Kansas, in August, 1881, and he, Mosty, told me that he and R. E. McAnulty were partners; that is what I told you. Buzard then remarked, "*Yes, you said something of the kind.*" About that time I was called off in the store, and heard no more of the conversation. The conversation occurred at the front northeast corner of my store in the town of Gonzales, in Gonzales County, Texas; the parties, Mr. Buzard and R. A. Houston, were sitting on a pair of skids; there were three front doors in my store-building, and I was standing in the east front door of the same. (Record p. 96, par. 256.)

J. H. Stephens, a witness for the defendant, being asked:

If you have stated what you know of the said partnership, then please state now whether you know any-

thing of a cattle contract between said L. A. Mosty and Robert A. Houston, existing in the summer and fall of 1881, and what you know about that contract. State also whatever and what connection that contract had with the partnership of McAnulty & Mosty? (Record p. 99, par. 264.)

A. I know nothing of a contract between McAnulty and Mosty, or between Mosty and Houston, in regard to a partnership as before stated, and all that I do know about this business is as follows: In the storehouse of Wright, Beverly & Co., in Dodge City, Kansas, about the time the contract between Mosty and Houston was said to have been made, R. E. McAnulty said to me, "It is my money that is furnishing those cows, but Bob does not know it." I understood this statement to refer to the contract between Mosty and Houston, because Houston and McAnulty had just had a conversation in reference to that contract, which I heard, and this remark was made just after Robert Houston left the house. (Record p. 103, par. 276.)

The appellee contends:

1. That the allegations of fraud in the bill are not established by the evidence.

2. This appeal must be dismissed because, neither in the transcript of record, nor in the brief of appellants, is there any allegation, either general or specific, that the decree is erroneous in any respect.

3. That the complainants in this case have a remedy at law, if any at all, in an action on the case in the nature of deceit, and should not seek a rescission of the contract in equity.

4. Admitting, for the purpose of argument, that the alleged fraudulent representations were made, they do not constitute adequate ground for the abrogation of this contract of assignment.

5. Fraud must be strictly proved as alleged.

Second. *This appeal must be dismissed because, neither in the transcript of record, nor in the brief of appellants, is there any allegation, either general or specific, that the decree is erroneous in any respect.*

Rule twenty-one of this court provides that the brief of the counsel for the plaintiff in error, or appellant, shall contain, "in the order here stated:"

"1. A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

"2. A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; *and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous.*" * * *

"4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

"5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court."

There is nothing in appellant's brief which raises a question of error either in law or fact, and if there be any question at all for consideration, it rises inferentially from a discussion of the weight of evidence.

On appeal, the burden of proof is upon the appellant, to show that the decree is erroneous, and, under this rule, he must specify in what the error consists.

Chief Justice Taney, in Taylor *vs.* Harwood—an admiralty suit in the circuit court—held that the judgment of the court below, on appeal, is to be regarded as correct, unless the appellant can show it to be erroneous. (Taney's Decs., 446.)

The principle holds equally true in equity.

Mr. Phillips, in his work on practice (p. 208), says: "The twenty-first rule, in case of appeal, requires an abstract of the proofs and pleadings, exhibiting clearly and succinctly the issues presented." "Each error must be separately alleged, and particularly specified, otherwise, it will be disregarded."

In Portland Co. *vs.* United States, (15 Wall., 1,) the Chief Justice, delivering the opinion of the court, said:

"From time to time, the court has adopted rules of practice intended to facilitate the presentation of causes by counsel and their consideration by the court. Finding that these rules, through the inattention of the bar, had failed in a great degree of their intended effect, we promulgated at the last term, and for the same end, an amended twenty-first rule." * * *

"In the case before us, this rule has been totally disregarded on the part of appellant. We shall, therefore, dismiss the appeal."

In view of the fact that the rule has been totally disregarded in this case also, and there being in the record no plain or apparent error, we respectfully ask that the appeal be dismissed.

Third. *The complainants in this case have a remedy at law, if any at all, in an action on the case in the nature of deceit, and should not seek a rescission of the contract in a court of equity.*

The sixteenth section of the judiciary act of 1789, (1 Stat., p. 82,) provides: "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

The bill here is based solely upon the allegations that the complainants were induced to take an assignment of the Mosty contract by the false, deceitful and fraudulent representations of defendant. It alleges that the representations were not only false in fact, but were known to be false by the defendant when he made them.

Consequently it makes a case of actual fraud—that is—fraud arising from circumstances of imposition.

In Boyce's Executors *vs.* Grundy, (3 Peters, 210,) which appears to be a leading case upon this subject, Mr. Justice Johnson, said: "This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.

Mr. Justice Swayne, in reviewing this doctrine, says: "But where the remedy at law is of this character, the party seeking redress must pursue it." (Parker *vs.* Cotton Co., 2 Black, 545.)

In the practical administration of their equitable

powers, the national judiciary have constantly affirmed, and steadily adhered to the doctrine in its negative form—that the equitable jurisdiction does not exist, and will not be exercised in any case, or under any circumstances, where there is a certain, adequate and complete remedy at law.

The cases on this subject are so numerous that it is difficult to make a selection, consequently we cite a few of them:

Thompson *vs.* Railroad Co., 6 Wall., 134–137.
Knox *vs.* Smith, 4 How., 298.
Bennett *vs.* Butterworth, 11 How., 669.
Parker *vs.* Cotton Co., 2 Black, 545.
Oelrich *vs.* Spain, 15 Wall., 211.
Lewis *vs.* Cocks, 23 Wall., 466.
Van Norton *vs.* Merton, 99 U. S., 378.
Guarantee Co. *vs.* Water Co., 107 U. S., 205.
Baker *vs.* Biddle, 1 Baldwin, 394.

This case treats very fully of the whole doctrine.

If the fraudulent allegations are true, the bill makes a clear case for an action for deceit, and the judgment in such an action would be as fully adequate as can be the remedy by decree here.

A familiar illustration of the right to bring a common law action for fraudulent representation, as furnished by text writers, is an action brought for falsely representing a third party to be solvent, and thereby inducing the plaintiff to part with his money.

Pasley *vs.* Freeman, 2 Smith's L. C., 92.
Bispham's Equity, p. 253.

As late as April, 1885, this court, in Litchfield *vs.* Ballou—a suit in chancery to enforce payment of moneys for which it had been previously held an action

at law could not be maintained, held—"when a bill in chancery sets forth facts which would support an action at law for money loaned and received, the latter is the appropriate remedy, and the bill fails for want of equitable jurisdiction." (Litchfield *vs.* Ballou, 114 U. S., 190.)

Of course the court will always recognize a distinction between one who has merely parted with his money, which can be made good in an action for damages, and one who might otherwise suffer an irreparable injury. In the first case equity would dismiss the bill for failure of jurisdiction, because of an adequate remedy at law, and in the second they would render a decree for specific performance or such other relief as the circumstances of the case might warrant.

Jackson *vs.* Ashton, 11 Peters, 229.
Parkhurst *vs.* Van Courtland, 14 Johnson, N. Y., p. 15.

We submit that in view of the allegations of the bill, if the charges are well founded, and in the light of these authorities, an action on the case at law for the fraudulent representations would give an adequate remedy, and the judgment in such an action would be an exact equivalent of the remedy which can be given by decree in this suit, that is, the sum of money paid on the assignment with damages and interest, and consequently that the decree below must be affirmed.

Fourth. *Admitting for the purpose of argument that the alleged fraudulent representations were made, they do not constitute adequate ground for the rescission of this contract of assignment.*

Having accepted the assignment without recourse, the parties not standing in a relation of trust or confidence, and the representations being of matters equally within the means of knowledge of both parties, the complainants are estopped from averring that they failed to make those inquiries which, as persons of ordinary prudence and caution, they should have made.

Mr. Justice Story says (Equity Jurisprudence, p. 209, sec. 197): "The representation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. *It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, where neither party is presumed to trust to the other, but to rely on his own judgment.* Not but that misrepresentation, even in a matter of opinion, may be relieved against as a contrivance of fraud, in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled by it. But, ordinarily, matters of opinion between parties dealing upon equal terms, though falsely stated, are not relieved against, because they are not presumed to mislead or influence the other party, when each has equal means of information. Thus a false opinion expressed intentionally by the buyer to the seller of the value of the property offered for sale, where there is no special confidence or relation or influence between the parties and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale."

"A mistaken opinion of the value of property, if

honestly entertained and stated as opinion merely, unaccompanied by any assertion or statement untrue in fact, can never be considered as a fraudulent misrepresentation." Hepburn *vs.* Dunlop, 1 Wheaton, 189; Irwin *vs.* Kirkpatrick, 3 Eng. Laws and Eq., 17.

"In order that a misrepresentation may support an action at law or be a ground for relief in equity it is essential that it should be material in its nature and should be a determining ground of the transaction." Benjamin on Sales, Bennett's Ed., p. 465, Note E, and the numerous authorities in support thereof.

"The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must relate to a material matter, constituting an inducement to the contract and respecting which the complaining party did not possess at hand the means of knowledge, and it must be a misrepresentation upon which he relied and by which he was actually misled to his injury."

"Where the means of knowledge are at hand and equally available to both parties and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentation." (Slaughter, administrator, *vs.* Gerson, Mr. Justice Field's opinion, 13 Wallace, 379–383.) "If," the opinion continues, "having eyes he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over confidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentation, but seeks

from other quarters means of verification of the statements made, and acts upon the information thus obtained."

It cannot be supposed that the complainant Buzard relied solely and entirely upon the representations alleged to have been made by the defendant, when he had only met him once before the final transaction; and if he did so rely then he was grossly negligent in not seeking to substantiate the statements of an entire stranger in such an important business transaction, and especially so when he had, or could have had, ample time to inform himself as to the correctness of such statements.

The fact whether McAnulty was a partner of Mosty in this contract, is not material in this case, as it does not appear upon the face of the Mosty contract that he was interested in the performance of said contract, or had anything to do with it. This fact, coupled with the clause in the assignment that it should be without recourse upon Houston, ought to have put complainants upon inquiry in respect to a representation upon which, they allege, to have mainly relied.

Buzard, it seems by his testimony, was very careful to inform himself about the financial standing of McAnulty and Houston, but it does not appear that he even tried to ascertain the financial standing of Mosty, when he had so many facilities at hand for so doing.

There is much to show in the evidence that the fact of Mosty's failure was not known until about the early part of November, 1881, after this transaction had taken place. Buzard's testimony shows that his neighbor, Carothers, from whom he learned of Mosty's failure, first heard of it about Nov. 9. Record p. 56, par. 147.

R. E. McAnulty says "he does not know whether Mosty was solvent or not at the dissolution of the partnership." Record p. 79, par. 210.

These are the only witnesses for the complainants who touch upon this subject.

Dilworth, a banker, who should be conversant upon such subjects, says "Mosty's general financial reputation was that of a solvent, responsible man up to the latter part of October or November 1, 1881." Record p. 82, par, 217.

S. R. Walker says: "I did not hear of the failure of Mosty until some time after the trade was closed between Buzard and Houston." Record p. 84, par. 223.

Buzard swears that he did not hear of it until November 10, 1881, in Austin. Record p. 87, par. 230.

This evidence seems to show that Mosty was a solvent man on November 1, 1881, or generally so regarded, and if Buzard made inquiry concerning his standing his inquiries elicted favorable answers.

What was L. A. Mosty's general financial reputation?

Buzard swears he did not know anything of Mosty's standing or financial condition.

D. W. Hinkle swears he did not know anything of Mosty's standing at the time of this transaction, and says his opportunities were better, perhaps, than any other man in the State of knowing the standing of cattle men generally. Record p. 63, bottom of page. But, in another place, Buzard swears Hinkle told him that Mosty was good, and that he had handled over 20,000 head of cattle that season, and had made a lot of money. Record p. 59, par. 155.

Thomas Dewees and John W. Gamel do not mention Mosty's name in their testimony.

McAnulty says, on cross-examination: I do not state that Mosty was solvent or insolvent at the time of the dissolution of the partnership. Record p. 77, par. 210.

Of witnesses for defense—

Houston says: "I told him (Buzard) I considered him

(Mosty) good; that I thought he was good for his contracts; that he had made two contracts of the same kind with friends of mine in my county, and the parties told me that Mosty was a gentleman, and had carried out the contracts with them perfectly. He asked me who the parties were, I told him Bennett Bros. and Miller, Sayers and Kokernut. Record p. 86. par. 227.

G. N. Dilworth, L. G. Robinson, and S. R. Walker also swear that Mosty's financial standing was good.

Was there a co-partnership existing between L. A. Mosty and R. E. McAnulty at the time the contract was entered into between Mosty and Houston?

Buzard swears, "Houston stated then that he knew McAnulty was a partner, as McAnulty had told him so." Record p. 50, par. 130.

Hinkle swears, "When Houston spoke of McAnulty as being a partner of Mosty, he said that McAnulty, and not Mosty, had told him so." Record p. 64, par. 167.

McAnulty, of course, swears that he was not a partner with Mosty in this contract, and it was only natural for him to so swear, for otherwise, if he admitted the partnership, he would become liable upon such contract.

Houston swears, "I told Buzard that Mosty had told me, as we were coming from Kansas City together, that he was a partner of R. E. McAnulty in all their cattle dealings; that he said they were partners, but the contract did not show that they were partners, but Mosty had told me they were partners." Record p. 86, par. 228.

After the failure of Mosty, Buzard went to Gonzales, Houston's home, to demand the return of his money. After some further conversation, Houston swears that Buzard said, "Did you not tell me that McAnulty was

a partner of Mosty? I (Houston) told him no, that Mosty had told me so coming down from Kansas City on the train, and Buzard said *he knew I had Mosty and McAnulty in partnership in some way, and he did not remember how it was.*" Record p. 87, par. 230.

Henry Heath, in his testimony, corroborates Houston's in regard to this conversation. Record p. 97, par. 257.

J. H. Stephens swears * * * "All I know about this business, is as follows: In the storehouse of Wright, Beverly & Co., in Dodge City, Kansas, about the time the contract between Mosty and Houston was said to have been made, R. E. McAnulty said to me: '*It is my money that is furnishing those cows, but Bob does not know it.*' I understood this statement to refer to the contract between Mosty and Houston, because Houston and McAnulty had just had a conversation in reference to that contract, which I heard, and this remark was made just after Robert Houston left the house." Record p. 103, par. 276.

It will be seen by reference to Record (p. 45, par. 116) that the defendant endeavored to obtain the testimony of L. A. Mosty, but the officer to whom the commission was addressed returned the same, saying that he (Mosty) was absent from the State.

A representation which merely amounts to a statement of opinion, judgment, probability or expectation, or is vague and indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, goes for nothing, though it may not be true, for a man is not justified in placing reliance on it. An indefinite representation ought to put the party to whom it is made upon inquiry. If he chooses to put faith in such

a statement, and abstains from inquiry, he has no ground of complaint.

Kerr on Fraud, p. 82, and English cases cited.
Payne *vs.* Smith. 20 Georgia, 654.
Turner *vs.* Navigation Co., 2 Dev. Ch. (N. Car.), 236.
Halls *vs.* Thompson, 1 Smed. & Mar. (Miss.), 443.

Generally speaking, an honest statement of fact, believed to be true by the party making it, though made with a view to being acted upon, and justifying action upon it from the standpoint of the conduct of a prudent man, will not, upon turning out to be false, create a liability for damages against the party making it, nor would it afford the complaining party ground for relief from any contract which he may have made with the supposed wrongdoer under the inducement of such a misrepresentation, so far, at least, as such relief is demanded on the ground of fraud. Fraud is not established, and redress or relief will not in general be granted, without proof that the party who made the false representation knew at the time that it was false.

Bigelow on Fraud, p. 57, and English cases cited.
Carley *vs.* Wilkins, 6 Barbour, 557.
Pomeroy's Eq., sec. 878.

It is clear from this review of the evidence that the representations were and could only be matters of opinion equally open to the knowledge of both parties and, as we said before, misrepresentations in matters of opinion will only be relieved against in cases of trust and confidence, where the party deceived has a right to rely upon the statements.

Fifth. *Fraud must be strictly proved as alleged.*

"In all cases where the cancellation or surrender of a contract is sought on the ground of fraud, equity can give no relief, unless a case of fraud be definitely and distinctly alleged, and clearly and distinctly proved as alleged."

Story's Eq., sec. 694, vol. 1.

Atlantic Delaine Co. *vs.* James, 94. U. S., 207.

If the alleged representations constitute fraud at all they make a case of actual fraud. The party to whom they were made did not stand in a position of trust or confidence, and was not justified in relying upon representations in reference to a matter open to him. Consequently it is necessary for him to prove not only that the representations were false in fact, but that the defendant knew them to be false at the time they were made.

Mr. Justice Clifford, in Hagar *vs.* Thompson (1 Black, 91), says: "Fraud cannot be presumed, or inferred without proof, in a court of equity, any more than in a court of law, and in both the rule is that he who makes the charge must prove it."

See also Greeg *vs.* Lessee of Sayre, 8 Pet., 244.

The defendant swears that at the time of assigning the Mosty contract, he believed Mosty to be solvent, and he also believed that McAnulty was a partner of Mosty's. But the complainant has endeavored to prove that Houston had knowledge of the insolvency of Mosty, and also of the fact that McAnulty was not a partner in the transaction, but the evidence introduced is clearly insufficient to establish either of the propositions.

There are well established limits to the equitable

conception of actual fraud. Where a party makes a statement, which proves to be untrue, and has at the time no knowledge of its truth, and no reasonable ground for believing it to be true, of course he is chargeable with fraud, although he had no absolute knowledge on the subject. But if he makes a statement which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon reasonable grounds, the misrepresentation so made cannot be relieved against even in a court of equity.

Sawyer *vs.* Prickett & Wife, 19 Wall., 146.
Cabot *vs.* Christee, 42 Vermont, p. 121.
Fisher *vs.* Mellen, 103 Mass., p. 503.
Wakeman *vs.* Daley, 51 N. Y., p. 27.
Marsh *vs.* Falker, 40 N. Y., p. 562.
Weed *vs.* Case, 55 Barbour, 534.
Wheeler *vs.* Randall, 48 Ill., p. 182.
Fulton *vs.* Hood, 34 Penn., 365.

The testimony does not establish that the alleged representations were assertions of fact, and, at most, they could only be statements based upon general knowledge, information and judgment. It was not a matter generally known that Mosty was insolvent at the time of this assignment, and the defendant stood in no peculiar relation to him whereby he could know as a fact anything of his financial position.

The parties to this assignment dealt upon equal terms. There was no relationship of trust or confidence between them. Buzard, according to his own statement, was a lawyer, (Record p. 87, par. 230), and we must infer from his extensive business that he was no novice in the knowledge of the legal rights and obligations of contracting parties.

Again, if there was a man who should have known the financial reputation of cattle men generally, and especially of so prominent a dealer as L. A. Mosty, it was D. W. Hinkle, who was one of the active proprietors of the Texas *Live Stock Journal.* Hinkle swears (Record p. 63, bottom,) that "my opportunities at that time of knowing the financial condition of cattle men generally was perhaps better than any man in the State." He also swears that he did not know the financial standing of Mosty at the time the contract was assigned. But Mr. Buzard, whose witness Hinkle was, swears that "Hinkle said that he considered that contract (Mosty's) perfectly good" * * * *and that "he knew Mosty was good,* as he had handled at least 20,000 head of cattle that season and had made a lot of money. Hinkle advised me to take an assignment of that contract instead of completing the other. This was a short time before, probably half an hour before Houston came to the meeting." Record p. 59, par. 155.

It seems clear from the whole evidence that this conversation at the private conference between Hinkle and Buzard, just prior to the final consummation of the transaction, Buzard, *acting on the advice* and knowledge of Hinkle, concluded to accept the assignment of the contract, and not upon the representations alleged to have been made by Houston. Record p. 63, par. 166.

There is much to show that Buzard relied almost entirely upon Hinkle's representations. "I told Buzard that if R. E. McAnulty was a partner of Mosty it made the Mosty contract as good as the bank, and I then advised him to take the transfer of the Mosty contract in the place of the other." Again, he says, "I stated (to R. S. Walker) Buzard wanted to have a talk with me before he gave Houston a definite answer. I had

this talk with Buzard. In this talk *I did not tell him of Mosty's financial condition.*" Record p. 65, par. 171.

This is substantially the evidence produced by the complainants to establish the allegations in their bill, of deceitful and fraudulent representations.

JAMES F. MILLER,
*Solicitor for Appellee.*